No. _____
(CAPITAL CASE)

IN THE

Supreme Court of the United States

OBEL CRUZ-GARCIA,

Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPT. OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

CAPITAL CASE

1. When a jury foreman in a capital murder trial brings a religious text to the jury room during punishment phase deliberations and reads passages concerning imposition of the death penalty to his fellow jurors, could reasonable jurists debate whether the jury has been exposed to an external influence under clearly established federal law?

2. When deciding whether to grant a certificate of appealability, should a circuit court look to whether the district court's resolution of the claim at issue is reasonably debatable in light of then-existing circuit precedent?

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the case caption.

LIST OF RELATED CASES

337th Judicial District Court, Harris County, Texas

Texas v. Cruz-Garcia, Cause No. 1384794

Texas Court of Criminal Appeals

Cruz-Garcia v. Texas, No. AP-77,025, 2015 WL 6528727 (Tex. Crim. App. Oct. 28, 2015) (direct appeal)

Ex parte Cruz-Garcia, Nos. WR-85,051-02 & WR-85,051-03, 2017 WL 4947132 (Tex. Crim. App. Nov. 1, 2017) (initial and first successive state habeas)

Ex parte Cruz-Garcia, No. WR-85,051-04, 2021 WL 4571730 (Tex. Crim. App. Oct. 6, 2021) (second successive state habeas)

United States District Court for the Southern District of Texas

Cruz-Garcia v. Lumpkin, No. 17-cv-3621, 2023 WL 6221444 (S.D. Tex. Sept. 25, 2023)

United States Court of Appeals for the Fifth Circuit

Cruz-Garcia v. Guerrero, No. 24-70003, 128 F.4th 665 (5th Cir. 2025)

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INTRODUCTION

Obel Cruz-Garcia's death sentence resulted from jury deliberations during which the jury foreman read passages from the Bible about imposing the death penalty to his fellow jurors, which persuaded at least one juror to change her vote from life to death. Cruz-Garcia has sought a hearing and relief arising from this violation of the Sixth Amendment right to trial by an impartial jury in state and federal court, to no avail. He now seeks review of the United State Court of Appeals for the Fifth Circuit's ("Fifth Circuit") published opinion denying a Certificate of Appealability (COA) and holding that reasonable jurists would not debate that religious scripture about the death penalty and punishment are not an external influence upon a capital jury as a matter of clearly established federal law. In so holding, the Fifth Circuit drew an unprincipled bright line regarding what constitutes an external influence in violation of the Sixth Amendment. What is more, the Fifth Circuit reached the conclusion that no reasonable jurist would debate this bright line by revising its own precedent, which previously held the Bible to be an external influence on a capital jury deliberating on punishment as a matter of clearly established federal law. In other words, by denying COA in a published decision, the Fifth Circuit slammed the door shut on any further judicial inquiry on an issue it described as "unclear" and in a case which changes the landscape on what constitutes an external influence under the Sixth Amendment.

PETITION FOR A WRIT OF CERTIORARI

Obel Cruz-Garcia petitions this Court for a writ of certiorari to review the judgment of the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's February 6, 2025, published opinion is attached as Appendix A. The district court's September 25, 2023 opinion is attached as Appendix B.

STATEMENT OF JURISDICTION

The Fifth Circuit entered its published judgment on February 6, 2025. On April 15, 2025, the Court extended the time to file this petition to June 6, 2025. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the Sixth Amendment to the United States Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The case also involves 28 U.S.C. § 2254(d), which states in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

And it involves 28 U.S.C. § 2253(c), which states in relevant part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
> >
> > . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

The jury retired to deliberate on Cruz-Garcia's punishment in the afternoon of July 19, 2014, at the close of four days of punishment-phase evidence. ROA.12499.[1] The jury had previously found Cruz-Garcia guilty of capital murder as a party. ROA.11924. As the foreman of

[1] ROA refers to the record on appeal in the Fifth Circuit.

the jury (Matthew Clinger) later recounted in a recorded interview,[2] by the following morning, a third of the jury were undecided, a third would have answered the special issues such as to return a life verdict, and the remaining third would have answered those special issues such as to impose the death penalty.[3] ROA.7459–60. One of those jurors (Casey Guillotte) "broke down[.]" ROA.7469. Clinger, knowing "where [Guillotte] goes to church" and that "scripture is important to her," retrieved his Bible from his overnight bag and read from the Bible to the still-deliberating jury:

> Romans 13 is the passage I spoke about Friday morning. That Friday morning.
>
> You know, Paul's writing and saying that, uh, you known, the Lord has given the sword and, uh, the sword's really, it's not used to a slap on the hand, so. You know, I, that was, that was kind of the key passages I used. You know, Genesis 9 and a lot of places in Deuteronomy. So, you know, I just spoke knowing her, kind of, background and where she stood.

ROA.7470. When asked in that same recorded interview if he had quoted scripture from memory or read from the Bible, Clinger answered: "No, I read." ROA.7471. He explained that he had "research[ed]" certain passages from *Romans*, *Deuteronomy*, and *Genesis* in anticipation of the jury's deliberations on punishment. ROA.7470.

Romans, *Deuteronomy*, and *Genesis* all include scripture about the death penalty, punishment, and conduct for which the death penalty is mandated. For example:

> For the wages of sin is death, but the gift of God is eternal life in Christ Jesus our Lord.

App. A at 9 n.3 (quoting *Romans* 6:23 (New King James Version). Likewise:

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[2] Clinger was interviewed by a defense-retained investigator after Cruz-Garcia was sentenced and another juror reported her concerns to defense counsel about Clinger reading from the Bible during deliberations. *See* ROA.7384–92.

[3] *See* Texas Code of Criminal Procedure, Article 11.071 § 2(b).

> I will demand an accounting for the life of another human being. Whoever sheds human blood, by human blood be shed: for the image of God has made God mankind.

Genesis 9:5-6 (New International Version); *see also, e.g.*, *Deuteronomy* 19:11-13 (NIV) (death penalty for "shedding innocent blood"); *id.* 22:23–25 (death penalty for rape); 22:22 (death penalty for adultery). Notably, the bad acts for which these scriptures mandate the death penalty corresponded to both the crime Cruz-Garcia had been convicted of (as a party to the capital murder of a child) and to bad acts introduced by the State as part of its case on future dangerousness. *See, e.g.*, ROA.12493–94 (adultery), ROA.12432, 12478 (rape).

Following the reading of these scriptures, the jury was able to "move on" and answered the special issues such as to result in a death sentence. ROA.7471. In Clinger's words: "It made a difference with [Guillotte]" and "it made a lot of difference to me, kind of earlier in the process." ROA.7472–73. As he also recounted in his recorded interview:

> Uh, after I read that [Guillotte] was able to move, that was, we were finishing up talking about the first question and she was able to move on from the first question.

ROA.7471. Likewise, another juror (Angela Bowman) also recalled that after the foreman read from the Bible to the jury, Guillotte "changed her mind to vote for the death penalty." ROA.7413. Bowman also reported that "other jurors changed their position from life to death after [Clinger] read scriptures from the Bible." *Id.* That same day, the jury returned their verdict and Cruz-Garcia was sentenced to death. ROA.12530.

I. State court adjudication of the Bible as an external influence.

Based on Clinger's recorded statements and an affidavit from Bowman, Cruz-Garcia filed a Motion for New Trial alleging an external influence in violation of the Sixth Amendment.[4]

[4] In support of his motion, Cruz-Garcia also obtained affidavits from the defense investigator who interviewed Clinger and from trial counsel, to whom Bowman initially reported the Bible reading during deliberations. ROA.7384–92.

ROA.7384–92. In response, the State obtained an affidavit from Clinger, ROA.7435, who had refused to provide the same to Cruz-Garcia, ROA.12555. Contrary to his recorded interview, Clinger claimed in his account to the State that he had only "opened up [his] personal Bible to a chapter in Romans and laid it on the table" and that Guillotte "acknowledged it, but did not read it." ROA.7436. He also "did not believe that [Guillotte] or any other juror changed their answers to the Special Issues based on this brief exchange." *Id.* In her own affidavit provided to the State, Guillotte recalled that Clinger had in fact read from the Bible, but only to himself. ROA.7433. Both Clinger and Guillotte also indicated that by this time in their deliberations, the jury had reached a decision but not yet signed the verdict form. *Id.*; ROA.7436.

Based on these discrepant accounts, Cruz-Garcia requested that the trial court hear testimony from the jury about the allegations that Clinger had read from the Bible and to assess the influence of these scriptures upon the jury. ROA.7416–18. The trial court denied Cruz-Garcia's request and Motion for New Trial. ROA.12575. It nevertheless admitted the affidavits proffered by Cruz-Garcia and the State on the ground that "there is enough of a question as to whether this Bible production or Bible reading, whatever occurred, may be an outside influence." *Id.*

On direct appeal, Cruz-Garcia raised a Sixth Amendment violation based on an external influence on the jury. ROA.6814–15. He also argued that the trial court should have heard testimony from the jurors and that Texas Rule of Evidence 606(b) did not bar such testimony because the Bible could constitute an external influence. *Id.* The Texas Court of Criminal Appeals (TCCA) grappled with what it described as an "ambiguous" record of what happened, ROA.7580, before resolving the case by holding that the Bible is not an external influence: "This Court has never determined whether reference to the Bible during jury deliberations is an outside influence. Today we hold that it is not." ROA.7582. It acknowledged the contrary holding by the Fifth Circuit

in *Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008), in which the Fifth Circuit held that the Bible can be an external influence. ROA.7583 n.108. The TCCA instead adopted the approach of a Fourth Circuit case, *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006), which the *Oliver* court specifically rejected. ROA.7583 n.107; *see Oliver*, 541 F.3d at 336, 338 & n.12 (rejecting *Robinson* and instead embracing dissenting opinion[5]). Finally, based on its holding that the Bible is not an external influence, the TCCA found that any evidence about Clinger reading the Bible to the jury during deliberations was inadmissible under Texas Rule of Evidence 606(b) and should not have been admitted by the trial court. ROA.7584. It affirmed the trial court's denial of Cruz-Garcia's motion for a new trial and affirmed Cruz-Garcia's conviction. *Id*. Cruz-Garcia raised the same allegation in state habeas. The TCCA rejected the Sixth Amendment external influence claim as procedurally barred and denied relief on all other claims. ROA.15605, 15607–08.

II. Federal court adjudication of the Bible as an external influence.

Cruz-Garcia re-urged his Sixth Amendment claim in federal district court. ROA.3469–76. He argued that 28 U.S.C. § 2254(d)(1) was met as to the TCCA's holding that the Bible is not an external influence, based on the Fifth Circuit's holding in *Oliver* that the Bible can be an external influence as a matter of clearly established federal law—namely *Turner v. Louisiana*, 379 U.S. 466 (1965), *Parker v. Gladden*, 385 U.S. 363 (1966), *Remmer v. United States*, 347 U.S. 227 (1954), and *Mattox v. United States*, 146 U.S. 140 (1892). ROA.3478–79. Cruz-Garcia also moved for an evidentiary hearing to resolve the foreman's (and others') contradictory statements about his reading of the Bible to the jury. *See* ROA.6096; *see also Remmer*, 347 U.S. at 229–30 (requiring an evidentiary hearing where an external influence upon the jury is credibly alleged).

[5] *Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006) (King, J., dissenting from denial of rehearing en banc).

The district court denied an evidentiary hearing and held that Cruz-Garcia had not shown that the TCCA's holding that the Bible is not an external influence was contrary to, or an unreasonable application of, this Court's case law. App. B at 40. It based its § 2254(d) finding on the clearly incorrect premise that "[t]he Supreme Court has specifically found an external influence only when a juror has relied on 'racial stereotypes or animus to convict a criminal defendant . . .'" *Id.* at 37–40 (citing *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 225 (2017)).

Cruz-Garcia sought a Certificate of Appealability (COA) to appeal the district court's adjudication of the Sixth Amendment external influence claim. He argued that he had raised a substantial claim and that reasonable jurists could debate the district court's adjudication that the Bible was not an external influence as a matter of clearly established federal law. *See* Opposed Motion for Certificate of Appealability ("COA Mot.") at 41–55. Cruz-Garcia emphasized the Fifth Circuit's decision in *Oliver* holding that the Bible is an external influence as a matter of clearly established federal law, as well as the TCCA's acknowledgment on direct appeal that its holding to the contrary contrasted with *Oliver*. *Id.* at 46–49. He also identified numerous factual and methodological errors in the district court's adjudication of the claim, including its misstatement of fact that the Bible passages at issue bore no relation to the matter before the jury, *id.* at 52–53, and the district court's incorrect statement of this Court's case law on external influences, *id.* at 47–48.

The Fifth Circuit denied COA in a published decision. *See* App. A. Its holding in *Oliver* notwithstanding, the Fifth Circuit noted that "[i]t is unclear to what extent 'clearly established Federal law' addresses this issue." *Id.* at 7. It acknowledged *Oliver* but concluded that the TCCA's holding that the Bible is not an external influence could be reconciled with *Oliver* because "[t]here is no allegation that the jurors compared the facts of Cruz-Garcia's case to any specific Bible

passage." *Id.* at 8. The Fifth Circuit noted that, in *Oliver,* the jurors likely read a passage that "teaches that capital punishment is appropriate for a person who strikes another over the head with an object and causes the person's death," which bore some similarity to how the murder may have occurred in that case. *Id.* (quoting *Oliver*, 541 F.3d at 340).[6] Quoting passages that Clinger may have read from in Cruz-Garcia's case[7]—such as, "For the wages of sin is death . . . ."—the Fifth Circuit concluded that because of the lack of a similar connection between the text and the "facts of Cruz-Garcia's case," no reasonable jurist would debate that the Bible was not an external influence as a matter of clearly established federal law. *Id.*; *see also id.* at 9 n.3 ("[N]either of these passages, though referencing punishment and death, relates to the specific facts of the case.").

REASONS FOR GRANTING THE WRIT

Notwithstanding this Court's repeated cautioning the Fifth Circuit against its misapplication of the COA standard,[8] the Fifth Circuit ignored the district court's methodologically and factually unsound adjudication of the Sixth Amendment claim. Instead, it denied COA on this claim by faulting Cruz-Garcia for failing to make a "connection between the Bible passage . . . and the specific facts of the case," App. A at 9 n.3, a showing that *Oliver* did not require and expressly rejected, *Oliver*, 541 F.3d at 340. The Fifth Circuit concluded that, where the jury reads passages from the Bible calling for the death penalty reasonable jurists could not debate whether the Bible

[6] After shooting the victim, the defendant in *Oliver* struck him "several times in the head with a rifle butt." 541 F.3d at 331. The medical expert testified that while the victim "likely died from the gunshot wounds, the attack with the rifle butt also could have been fatal by itself." *Id.*

[7] The Fifth Circuit also limited its analysis to passages from Paul's Epistle to the Romans. App. A at 9 n.3. Clinger, however, told the defense that he had also read from *Genesis* and *Deuteronomy*, which also include discussions about the death penalty for certain acts. ROA.7470.

[8] *See, e.g.*, *Buck v. Davis*, 580 U.S. 100 (2017); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

constitutes an external influence upon a jury deliberating whether to impose the death penalty, unless the passages describe the specific facts of the offense.

Moreover, despite previously holding that the Bible could be an external influence as a matter of clearly established federal law, it held here in a published, precedential opinion that no reasonable jurist would debate that the Bible is not such an external influence. It thus foreclosed further argument or litigation on an important issue on which it previously reached the opposite conclusion, and calcified its external influence precedent with respect to the Bible. And the Fifth Circuit did so without an appeal actually taking place.

Developing precedent on underlying constitutional issues through the denial of COA in capital cases is virtually unheard of in most in other jurisdictions. Combined with the Fifth Circuit's practice of "paying lipservice" to the COA standard, *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), this works an obvious unfairness on petitioners, who must attempt to persuade the Fifth Circuit that an issue is reasonably debatable only to be rebuffed in a precedential decision announcing the resolution of that very debate. These decisions denying COA are then cited against future petitioners to deny their bids to appeal, such that important constitutional issues—including, as here, questions about whether certain rules are clearly established federal law—are never fairly litigated. District courts in the Fifth Circuit have taken note and, unsurprisingly, almost never issue COAs when they deny habeas petitions in death penalty cases. The Fifth Circuit, equally unsurprisingly, rarely grants COAs, with the result that the vast majority of death sentenced habeas petitioners do not receive an appeal to the Fifth Circuit.

I. Reasonable jurists could debate whether the jury has been exposed to an external influence under clearly established federal law when a jury foreman brings a religious text to the jury room and reads passages about the death penalty and punishment to the jury.

A. This Court has clearly established a rule that an external contact "about the matter pending before the jury"[9] can constitute an external influence upon the jury, in violation of the Sixth Amendment.

"The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner*, 379 U.S. at 472 (internal quotation marks omitted). This requirement was announced over a century ago, *Mattox v. United States*, 146 U.S. 140 (1892), and has since been consistently reaffirmed by this Court. *Turner*, 379 U.S. at 472; *Parker*, 385 U.S. at 365; *Remmer,* 347 U.S. at 229. That requirement is especially important in capital cases: "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox*, 146 U.S. at 149. A jury's exposure to an external influence results in a presumption of "extreme prejudice." *Turner*, 379 U.S. at 472–73; *Parker*, 385 U.S. at 365. Hence, "[i]n a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial[.]" *Remmer*, 347 U.S. at 229.

Where such an external contact is alleged, a court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 230; *see also Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). "Preservation of the opportunity

[9] *Remmer*, 347 U.S. at 229.

to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Phillips*, 455 U.S. at 216 (quoting *Dennis v. United States*, 339 U.S. 162, 171–72 (1950)).

This Court has identified extraneous contacts requiring a hearing to determine whether the jury was influenced in a variety of scenarios. *Mattox*, 146 U.S. at 150–51 (jury heard and read media information about the defendant's propensity for violence); *Parker*, 385 U.S. at 363–65 (jurors heard bailiff make comments about the defendant's guilt); *Remmer*, 347 U.S. at 228–30 (juror was contacted by the FBI after allegedly being offered a bribe to acquit the defendant). In short, "the Supreme Court has clearly established a constitutional rule forbidding a jury from being exposed to an external influence." *Oliver*, 541 F.3d at 336. And where such an external contact is alleged, clearly established federal law also requires a court to hold a hearing to determine the impact of the alleged external influence. *See Barnes v Joyner*, 751 F.3d 229, 242 (4th Cir. 2014).

In *Oliver*, the Fifth Circuit joined the First, Sixth, and Eleventh Circuits in describing the Bible as an external influence upon the jury violative of the Sixth Amendment. *Oliver*, 541 F.3d at 336–38; *United States v. Lara Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008); *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998); *McNair v. Campbell*, 416 F.3d 1291, 1307–08 (11th Cir. 2005). It thus also joined a number of state highest courts, including Alabama, *Perkins v. State*, 144 So.3d 457, 496 (Ala. Crim. App. 2012), California *People v. Danks*, 32 Cal. 4th 269, 307 (Cal. 2004), Colorado, *People v. Harlan*, 109 P.3d 616, 629 (Colo. 2005), and Tennessee, *State v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981).

What is more, in *Oliver*, the Fifth Circuit concluded that its holding that the Bible can be an external influence in violation of the Sixth Amendment was compelled by this Court's case law, namely *Turner*, *Parker*, *Remmer*, and *Mattox*. 541 F.3d at 340. The Fourth Circuit, despite initially taking a contrary path, later reached a similar conclusion, holding that a hearing was required as a

matter of clearly established federal law where it was alleged that one of the jurors shared scripture suggested by her pastor with the jury. *Barnes*, 751 F.3d at 248.

B. Reasonable jurists could debate whether religious texts about punishment and the death penalty are "about the matter pending before the jury."[10]

Against this backdrop, the Fifth Circuit held here that reasonable jurists would not debate that the Bible did not constitute an external influence where "there is no allegation that the jurors compared the facts of Cruz-Garcia's case to any specific Bible passage." App. A at 8. It acknowledged that *Oliver* stood for the holding that "[t]he jury's use of the Bible during the sentencing phase . . . amounted to an improper external influence." *Id.* at 8. Nevertheless, it drew a bright line based on whether a petitioner alleges a "connection" between the scripture read by the jury and the "specific facts of [the] case." *Id*. at 9 n.3. And despite its acknowledgement that the issue was "unclear" as a matter of clearly established federal law, it concluded that reasonable jurists would not debate that scripture discussing punishment and the death penalty would not constitute such an external influence upon a capital jury deliberating on the death penalty and punishment.

At a minimum, reasonable jurists could debate the bright line drawn by the Fifth Circuit that the Bible can be an external influence upon the jury as a matter of clearly established federal law only where the jurors compared "the facts of [the] case to any specific Bible passage[.]" App. A at 8. To the extent the Fifth Circuit's assertion that "[i]t is unclear to what extent clearly established federal law addresses this issue" is to be credited,[11] *Oliver* notwithstanding, there is

[10] *Remmer*, 347 U.S. at 229.

[11] Indeed, this Court has long cautioned against an overly narrow reading of its case law for the purpose of ascertaining what the clearly established federal law is. *See Andrew v. White,* 145 S. Ct. 75, 81 (2025). When conducting that inquiry, a lower court should also not limit clearly established federal law to its facts. *Andrew*, 145 S. Ct. at 82; *see also Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) ("[T]he lack of a Supreme Court decision on nearly identical facts

room for debate among reasonable jurists on whether scripture about punishment and the death penalty can be an external influence upon a jury deliberating on punishment. Any external contact "about the matter pending before the jury" raises a presumption of a prejudicial external influence violative of the Sixth Amendment. *Remmer*, 347 U.S. at 229. Religious texts about punishment arguably, if not surely, fall within that scope.

The Fifth Circuit's bright-line rule that a text is an external influence only where it "relates to the specific facts of the case" and that this bar was not met here also ignores Texas's capital sentencing framework. *Id.* at 9 n.3. At the punishment phase jurors are asked, as they were here, to answer whether there is a reasonable probability that the defendant will constitute a future danger and, if so, whether there are nevertheless mitigating factors warranting a life sentence. Tex. Code Crim. Proc. art. 37.071 § 2(b). In answering these questions, the jurors are not limited to "the facts of the case," App. A at 9 n.3: jurors may consider any evidence introduced at guilt and punishment, Tex. Code Crim. Proc. art. 37.071 § 2(d)(1). The Fifth Circuit's rule that a religious text is an external influence only where it mirrors "the facts of the case" thus ignores the significantly broader scope of jurors' deliberations at punishment in Texas. Here, the jury was not limited to answering the future dangerousness and mitigation special issues based on "the facts of Cruz-Garcia's case." App. A at 8. Notably, based on Clinger's recounting, he read scriptures which mandate capital punishment for a range of bad acts, including some introduced by the State as evidence of Cruz-Garcia's future dangerousness. *See Deuteronomy* 19:11-13 (NIV) (death penalty for "shedding innocent blood"); *id.* 22:23–25 (death penalty for rape); 22:22 (death penalty for

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does not by itself mean that there is no clearly established federal law, since 'a general standard' from this Court's cases can supply such law.").

adultery); *see also e.g.* ROA.12493–94 (adultery), ROA.12432, 12478 (rape). "[P]unishment and death," App. A at 9 n.3, are at the very heart of "the matter pending before the jury" when deliberating on capital sentencing. *Remmer*, 347 U.S. at 229; *see also Barnes*, 751 F.3d at 248–49 ("During the sentencing phase of Barnes' trial, the jury was charged with deciding whether to impose a sentence of life imprisonment or a sentence of death for Barnes and his co-defendants. Clearly, then, 'the matter before the jury' was the appropriateness of the death penalty for these defendants.").

The Fifth Circuit's reasoning also omits any weighing of the fact that religious texts may be read as an extra-judicial code of conduct—and, regarding the Bible, one which "*mandates* death for numerous offenses[.]" *Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989) (emphasis added); *see also id.* ("[T]he Bible is an authoritative religious document and is different not just in degree, although this difference is pronounced, but in kind."). But the mandatory imposition of the death penalty for certain bad acts is antithetical to the modern death penalty. *See Woodson v. North Carolina*, 428 U.S. 280, 301 (1976). And "*Furman* [*v. Georgia*, 408 U.S. 238 (1972)] mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Religious scripture mandating the death penalty for certain bad acts risks removing the discretion that is essential to modern capital sentencing. Reliance on religious scripture behind the closed doors of the deliberation room thus invites sentencing outside of the judicially-approved legal guidelines. The Fifth Circuit recognized as much in *Oliver*: "The Bible served as an external influence precisely because it may have influenced the jurors simply to

answer the questions in a manner that would ensure a sentence of death instead of conducting a thorough inquiry into these factual areas." 541 F.3d at 340.

C. An evidentiary hearing was required as a matter of clearly established federal law.

The bright line drawn by the Fifth Circuit is especially troublesome as there was no hearing in state or federal court, despite such a hearing being constitutionally mandated. *See Remmer*, 347 U.S. at 229–30; *see also Phillips*, 455 U.S. at 215. An external contact need only be "possibly prejudicial" to trigger this Sixth Amendment protection. *Mattox*, 146 U.S. at 150. In other words, a defendant is not required to demonstrate actual prejudice before a court is required to inquire into an allegation of external influence. For example, in *Remmer*, this Court observed that it did "not know from this record, nor does the petitioner know, what actually transpired" and accordingly remanded the case "with directions to hold a hearing [.]" 347 U.S. at 229–30. This Court has thus established a two-step inquiry where an external contact is alleged: where a possibly prejudicial contact is alleged, a hearing must then be held to determine the nature and impact of that external influence.

The Fifth Circuit acknowledged here that "[t]here is some dispute" regarding what occurred and when in the course of the jury's deliberations. App. A at 7; *see also* ROA.7580 (TCCA describing relevant record as "ambiguous"). Yet, it also faulted Cruz-Garcia for failing to establish that the jury was in fact influenced by the scriptures discussing punishment and the death penalty—despite the fact that both state and federal courts denied his requested evidentiary hearing on this issue. App. A at 8–9. The Fifth Circuit thus conflated the two-step inquiry outlined by this Court as a matter of clearly established federal law. As Cruz-Garcia argued below, the deprivation in state court of an opportunity to prove bias was in and of itself an unreasonable application of *Remmer*. COA Mot. at 50–51, 54–55; *see also Barnes*, 751 F.3d at 248 ("In essence, the [state]

Court demanded proof of a Sixth Amendment violation—that is, *proof* of juror bias—before Barnes was entitled to any relief. Such a requirement is directly at odds with *Remmer*." (emphasis in original)); *see also United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975) ("Inquiry must be made into how the books reached the jury room; whether they were available to members of the jury and, if so, for how long; the extent, if any, to which they were seen, read, discussed and considered by members of the jury; and such other matters as may bear on the issue of the reasonable possibility of whether they affected the verdict.").

Finally, even in the absence of an evidentiary hearing, there was considerable evidence that the Bible passages read by Clinger did have an influence on the jury's deliberations and verdict. Some hours into the deliberations, but before Clinger read from the Bible, the jury was split on how to vote. ROA.7459–60. Such disagreement amongst the jury thus left room for an external contact like the Bible to influence the jury. *See Parker*, 385 U.S. at 365 (disagreement amongst the jury relevant to finding that jury was influenced by external contact). In his recorded interview, Clinger himself stated that his reading of scriptures about the death penalty "made a difference" with at least one other juror, as well as to him too. ROA. 7472–73. Likewise, Bowman observed that Guillotte "changed her mind to vote for the death penalty" after Clinger had read from the Bible. ROA.7413. She also reported that "other jurors changed their position from life to death after [Clinger] read scriptures from the Bible." *Id.* And after being split three-ways in the morning and after Clinger read from the Bible, the jury returned unanimous answers to the Texas special issues that same afternoon.

D. Under the correct COA standard established by this Court's jurisprudence, a COA should have been granted here.

What is more, at the COA stage, the Fifth Circuit was tasked only with assessing whether reasonable jurists would debate the district court's adjudication of the external influence claim.

See Slack v. McDaniel, 529 U.S. 473, 483–84 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason."); *see also Buck v. Davis*, 580 U.S. 100, 115 (2017) ("At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims[.]'" (quoting *Miller-El*, 537 U.S. at 327)). Nevertheless, the Fifth Circuit denied COA by deciding the merits of an issue it described as "unclear." App. A at 7.

1. This Court has repeatedly emphasized that the merits should not be decided at the COA stage.

28 U.S.C. § 2253(c) requires a habeas petitioner to obtain a COA from either the district court or the court of appeals to appeal the denial of a § 2254 federal habeas petition. To obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." *Id.* In *Slack,* this Court interpreted § 2253(c) to incorporate the pre-AEDPA standard for obtaining a certificate of probable cause. 529 U.S. at 483–84. Specifically, when the district court denies a claim on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. When the district court rejects a claim on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

This Court has repeatedly emphasized that "[t]he COA inquiry . . . is not coextensive with a merits analysis" *Buck*, 580 U.S. at 115. At the COA stage, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of the debate." *Miller-El*, 537 U.S. at 342. Section 2253(c) therefore mandates only an "overview" of the claims and "a general assessment

of their merits." *Id.* at 336. A "full consideration of the factual and legal bases" of a petitioner's claims is not only not required by § 2253(c), but "the statute forbids it." *Id.* And the petitioner is also not required to "prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Id.* at 338. A circuit court therefore should not deny a COA "merely because it believes the applicant will not demonstrate entitlement to relief." *Id.* at 337. When a circuit court "sidesteps" the COA process "by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at 336–37; *see also Buck*, 580 U.S. at 115 (A "court of appeals my not rule of the merits of [a] case" unless a COA has first issued).

Since deciding *Slack*, the Court has repeatedly reversed the Fifth Circuit for not adhering to the COA standard. *See Miller-El*, 537 U.S. at 322; *Banks v. Dretke*, 540 U.S. 668 (2004); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004); *Buck*, 580 U.S. at 100. This Court has criticized the Fifth Circuit's practice of "paying lipservice to the principles guiding issuance of a COA," by ostensibly applying the reasonable-jurists-could-debate standard while actually reaching the merits of the case. *Tennard*, 542 U.S. at 283; *see also Miller-El*, 537 U.S. at 342 (Fifth Circuit made "fundamental" error of resolving merits of claim without first issuing a COA). Most recently, in *Buck*, this Court found that although the Fifth Circuit had "phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief," it had nonetheless "reached that conclusion only after essentially deciding the case on the merits." 580 U.S. at 115–16.

2. The Fifth Circuit denied a COA by resolving the merits of the question of whether the Bible is an external influence as a matter of clearly established federal law.

This case shows that the Fifth Circuit has not headed this Court's directives concerning the COA standard, and a COA was clearly warranted in this case. The Fifth Circuit's misapplication

of the COA standard is twofold. First, it ignored the district court's clearly incorrect adjudication of Cruz-Garcia's external influence claim. The district court reasoned that the TCCA's holding that the Bible was not an external influence did not offend clearly established federal law because "[t]he Supreme Court has specifically found an external influence only when a juror has relied on 'racial stereotypes or animus to convict a criminal defendant . . .'" App. B at 38 (citing *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 225 (2017)). That reasoning was doubly wrong, as *Pena-Rodriguez* was concerned with an *internal* influence (a juror's racial stereotypes or animus), and this Court has found *external* influences in several other scenarios. *Mattox*, 146 U.S. at 150–51 (media information about the defendant's propensity for violence); *Parker*, 385 U.S. at 363–65 (bailiff's comments about the defendant's guilt); *Remmer*, 347 U.S. at 228–30 (FBI contact with a juror after allegedly being offered a bribe to acquit the defendant).

Just as in *Tennard*, "[d]espite paying lipservice to the principles of guiding issuance of a COA," the Fifth Circuit ignored the district court's actual reasoning and instead "proceeded along a distinctly different track." 582 U.S. at 283. That path led its to own precedent in *Oliver*, which held that the TCCA had unreasonably applied clearly established federal law when it found that the jury had not been exposed to an external influence after one of the jurors brought a Bible into deliberations and pointed to passages that appeared to describe the facts of the case. The *Oliver* court also noted that "[m]ost circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence," and expressly disapproved the one contrary decision. *Oliver*, 541 F.3d at 339.

Second, *Oliver* and the Fifth Circuit's description of the issue as "unclear" notwithstanding, the Fifth Circuit denied a COA by resolving the merits of the question whether the Bible rises to an external influence as a matter of clearly established federal law. It reached this conclusion by

seizing on the narrowest of factual distinctions between this case and *Oliver*: that while Cruz-Garcia had submitted evidence that the jurors read passages about the imposition of the death penalty—including for bad acts introduced by the State, such as murder, rape, and adultery—he had not alleged that the jurors read passages mirroring how these crimes and bad acts were committed. App. A at 8. Despite the fact that neither *Oliver* nor this Court's case law suggests that is a meaningful distinction when identifying an external influence, the Fifth Circuit held that no reasonable jurists would debate this distinction.

The Fifth Circuit clearly misapplied the COA standard in doing so. Courts should not deny a COA merely because there is no case law with factually identical circumstances, particularly where there is binding precedent indicating the possibility of a different result. *Banks*, 540 U.S. at 704–05 . The Fifth Circuit did not give any explanation for why reasonable jurists would not debate this holding, other than that *Oliver* did not mandate concluding that the Bible amounted to an external influence as a matter of this Court's precedent under the facts of the case. That, however, is not the standard. *Miller-El*, 537 U.S. at 338 ("We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus."); *Buck*, 580 U.S. at 116 (petitioner not required to "make the ultimate showing that his claim is meritorious" to be entitled to a COA). Instead, while "paying lipservice" to the COA standard, *Tennard*, 542 U.S. at 283, by "phras[ing] its determination in proper terms—that jurists of reason would not debate that [Cruz-Garcia] should be denied relief," the Fifth Circuit "reach[ed] that conclusion only after essentially deciding the case on the merits," *Buck*, 580 U.S. at 115–16. The Fifth Circuit's decision marked out a definitive line between when the Bible is and is not an external influence under clearly established federal law. In doing so, it went beyond the "debatability of the underlying

constitutional claim" to "the resolution of that debate," which this Court has prohibited at the COA stage. *Miller-El*, 537 U.S. at 342.

E. The case squarely presents the issue.

The TCCA adjudicated Cruz-Garcia's Sixth Amendment external influence claim on the merits. The Fifth Circuit's decision turned on whether the Bible can constitute an external influence as a matter of clearly established federal law, an issue it described as "unclear." App. A at 7. The Court should grant review to clarify this important question.

II. The Fifth Circuit bypassed the question of whether jurists of reason would debate Cruz-Garcia's claim in light of the court's existing precedent, and instead denied COA by creating new precedent concerning the merits of the underlying issue.

Not only did the Fifth Circuit merely pay "lipservice" to the COA standard while effectively deciding the merits of the appeal without jurisdiction, *Tennard*, 542 U.S. at 283, but it did so in a published, precedential opinion that broke new constitutional ground concerning the underlying issue of the Bible as an external influence as a matter of clearly established federal law. Developing its constitutional precedent by denying COA in published, precedential opinions is a common practice in the Fifth Circuit. But, it is contrary to this Court's decisions concerning COAs and results in deep unfairness to petitioners.

A. The Fifth Circuit regularly creates new precedent in published decisions denying a COA.

Just as troubling as its flouting of this Court's COA jurisprudence is the Fifth Circuit's practice—perfectly exemplified in this case—of publishing its COA denials and thereby creating new precedent concerning underlying constitutional claims without an actual appeal taking place. That the Fifth Circuit issued its decision in this case in a precedential, published opinion not only reinforces the conclusion that the Fifth Circuit exceeded the proper scope of COA review, it also provides a strong reason for this Court to grant certiorari to consider the Fifth Circuit's practice of

developing its constitutional precedent through COA denials in capital cases, which is virtually unheard of in many other jurisdictions.

In the Fifth Circuit, only opinions that are published constitute precedent. 5th Cir. R. 47.5.4. Publication is reserved for cases that meet specific criteria, including those that establish new rules of law; modify, explain, or criticize existing rules or apply them to novel facts; concern an issue of significant public interest; or have been remanded by the Supreme Court. 5th Cir. R. 47.5.1. Decisions can also be published if there is a concurring or dissenting opinion, or when they reverse the district court's decision or affirm it on alternate grounds. *Id.*

By contrast, cases that "merely decide particular cases on the basis of well-settled principles of law" should not be published. 5th Cir. R. 47.5.1. One would expect that cases holding that no reasonable jurists would debate the district court's resolution of the claims before it would not meet the standards for publication. Indeed, such cases would seem to precisely fit the standard for non-publication in that they "merely decide [the] case[] on the basis of well-settled principles of law." *Id.*

Since this Court decided *Buck*, however, the Fifth Circuit has issued at least 13 published decisions that deny a COA after the denial of a petitioner's initial capital habeas petition.[12] This does not include cases that might otherwise meet the publication standard because they contain significant holdings regarding procedural issues or contain dissenting or concurring opinions, decisions that includes substantive discussion of other issues, or decisions where the denial of COA

[12] *Cruz-Garcia v. Guerrero*, 128 F.4th 665 (5th Cir. 2025); *Brewer v. Lumpkin*, 66 F.4th 558 (5th Cir. 2023); *Harper v. Lumpkin*, 64 F.4th 684 (5th Cir. 2023); *Guidry v. Lumpkin*, 2 F.4th 472 (5th Cir. 2021); *Buntion v. Lumpkin*, 982 F.3d 945 (5th Cir. 2020); *Howard v. Davis*, 959 F.3d 168 (5th Cir. 2020); *Gonzalez v. Davis*, 924 F.3d 236 (5th Cir. 2019); *Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018); *Hummel v. Davis*, 908 F.3d 987 (5th Cir. 2018); *Fratta v. Davis*, 889 F.3d 225 (5th Cir. 2018); *Rockwell v. Davis*, 853 F.3d 758 (5th Cir. 2017); *Prystash v. Davis*, 854 F.3d 830 (5th Cir. 2017).

occurred at a stage of the litigation later than the district court's denial of the initial habeas petition.[13]

The Fifth Circuit's routine publication of COA denials confirms that it is paying lipservice to the COA standard. In addition to Cruz-Garcia's case, the recent case of *Harper v. Lumpkin* makes this abundantly clear. The panel's original opinion contained a few references to the reasonably-debatable standard, but otherwise simply decided the merits of the claims. *See Harper v. Lumpkin*, 19 F.4th 771, 777, 782–83 (5th Cir. 2021). The petitioner moved for rehearing on the basis that the court had exceeded its jurisdiction by deciding the merits without first issuing a COA. *See generally Harper v. Lumpkin*, No. 20-70022, Doc No. 125 (5th Cir. Feb. 6, 2023). In response, the court issued a new opinion that added over 30 references to the reasonably-debatable standard while reaching the same result. *Harper v. Lumpkin*, 64 F.4th 684 (5th Cir. 2023).

B. No other circuit regularly creates constitutional precedent through COA denials like the Fifth Circuit.

The Fifth Circuit is an extreme outlier when it comes to issuing precedential decisions that merely deny a COA in § 2254 cases, particularly cases that come to the court from a district court's denial of an initial federal habeas petition. Since this Court decided *Buck*, the First, Second, Fourth, Seventh, and Eighth Circuits have not issued any published decisions that do anything more than deny a COA in a § 2254 case. The sole published case from the Third Circuit concerns a procedural issue of first impression about the COA standard.[14] The Sixth Circuit issued two such opinions in

[13] *See, e.g.*, *Ricks v. Lumpkin*, 120 F.4th 1287 (5th Cir. 2024) (2-1 holding that COA may be denied on a procedural ground not relied on by the district court); *Johnson v. Lumpkin*, 74 F.4th 334 (5th Cir. 2023) (denying COA and also affirming denial of recusal motion).

[14] *Becker v. Sec'y Pa. Dep't of Corr.*, 28 F.4th 459 (3d Cir. 2022) (holding as a matter of first impression that AEDPA deference is incorporated into the COA standard).

2017,[15] but appears to have abandoned the practice thereafter.[16] The Ninth Circuit does not appear to have issued any precedential decisions denying COA from the denial of an initial petition, but has generally limited its precedential decisions to cases with procedural issues of first impression.[17] The Tenth and Eleventh Circuit's precedential decisions denying COA in § 2254 cases are generally confined to execution-related claims[18] or other unusual situations.[19]

That the other circuits diverge from the Fifth Circuit in not issuing new precedent on underlying constitutional issues when they deny a COA should not be surprising. This Court was clear in *Buck* that "whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry." 580 U.S. at 117. This Court was also clear that the COA process should not duplicate or be a substitute for an appeal. *Id.* The Fifth Circuit's unique practice of publishing many of its COA denials is hardly consistent with these directives.

C. The Fifth Circuit's practice of denying COA in published decisions leads to most death sentenced petitioners being denied an appeal.

The Fifth Circuit's use of COA denials to create new precedent has real costs. By merely "paying lipservice" to the actual COA standard while actually deciding the merits of cases in

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[15] *Dufresne v. Palmer*, 876 F.3d 248 (6th Cir. 2017); *Berry v. Warden, S. Ohio Corr. Fac.*, 872 F.3d 329 (6th Cir. 2017).

[16] Earlier this year, a single judge published an order denying COA, *Dennis v. Burgess*, 131 F.4th 537 (6th Cir. 2025), but the decision is not precedential under Sixth Circuit rules. *See* 6 Cir. R. 32.1(b).

[17] *See Rose v. Guyer*, 961 F.3d 1238 (9th Cir. 2020) (holding as a matter of first impression that a COA is required to appeal the denial of a motion to enforce a conditional writ); *Payton v. Davis*, 906 F.3d 812 (9th Cir. 2018) (holding as a matter of first impression Rule 60(d) is subject to COA requirement); *see also Martinez v. Shinn*, 33 F.4th 1254 (9th Cir. 2022) (Rule 60(b) case).

[18] *Cole v. Ferris*, 54 F.4th 1174 (10th Cir. 2022); *James v. Sec'y, Dep't of Corr.*, 130 F.4th 1291 (11th Cir. 2025); *Mills v. Comm'r, Ala. Dep't of Corr.*, 102 F.4th 1235 (11th Cir. 2024).

[19] *Lafferty v. Benzon*, 933 F.3d 1237 (10th Cir. 2019) (on retrial after Tenth Circuit vacated previous conviction and death sentence); *Tharpe v. Warden*, 898 F.3d 1342 (11th Cir. 2018) (on remand from Supreme Court in light of *Pena-Rodriguez*); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158 (11th Cir. 2017) (60(b) case decided immediately after *Buck*). Although it was given a federal reporter citation, *Sardakowski v. Remaro*, 883 F.3d 1300 (Mem) (10th Cir. 2018) was designated as unpublished by the panel that issued it. *See* Docket, Case No. 17-1443 (10th Cir.).

published decisions, the Fifth Circuit improperly raises the bar for obtaining a COA, and forces district courts to do so as well. *Tennard*, 542 U.S. at 283. As a result, district court COA grants following the initial denial of a habeas petition are exceedingly rare in the Fifth Circuit. This is true even in death penalty cases. Among the capital petitioners who have had their initial habeas petitions denied by the district court since *Buck*, just four have had a COA granted by the district court.[20] Two of those grants were by the same district judge.[21] The remaining 54 petitioners were all denied permission to appeal.[22] That is, under the Fifth Circuit's COA case law, 93% of death-

[20] *Ramirez v. Lumpkin*, No. 7:18-CV-0386, 2024 WL 4491822 (S.D. Tex. Oct. 15, 2024); *Armstrong v. Lumpkin*, No. 7:18-CV-00356, 2021 WL 179600 (S.D. Tex. Jan. 19, 2021); *Soliz v. Davis*, No. 3:14-CV-4556-K, 2017 WL 3888817 (N.D. Tex. Sept. 6, 2017); *Sheppard v. Davis*, No. 4:14-0655, 2017 WL 1164293 (S.D. Tex. Mar. 29, 2017).

[21] *Ramirez* and *Armstrong*.

[22] *Cargill v. Director, TDCJ-CID*, No. 6:17-CV-562-RWS-JBB, 2025 WL 967154 (E.D. Tex. Mar. 31, 2025); *Marshall v. Lumpkin*, No. 4:14-CV-03438, Doc. No. 210 (Mar. 31, 2025); *Jordan v. Cain*, __ F. Supp. 3d __, 2024 WL 5401672 (S.D. Miss. 2024); *Harris v. Lumpkin*, __ F. Supp. 3d __, 2024 WL 4703371 (N.D. Tex. 2024); *Rubio v. Lumpkin*, 729 F. Supp. 3d 616 (S.D. Tex. 2024); *Joubert v. Lumpkin*, No. 13-CV-3002, 2024 WL 4281444 (S.D. Tex. Sept. 24, 2024); *Keller v. Cain*, No. 1:21-CV-134-KHJ, 2024 WL 4268134 (S.D. Miss. Sept. 23, 2024); *Davis v. Lumpkin*, Civ. No. H-16-1867, 2024 WL 4047531 (S.D. Tex. Sept. 4, 2024); *Grayson v. Fitch*, No. 1:04-CV-708, 2024 WL1218568, (S.D. Miss. Mar. 21, 2024); *Lizcano v. Lumpkin*, 695 F. Supp. 3d 815 (N.D. Tex. 2023); *Wells v. Lumpkin*, No. 4:21-CV-1384-O, 2023 WL 7224191 (N.D. Tex. Nov. 2, 2023); *Davis v. Lumpkin*, No. EP-14-CV-121-KC, 2023 WL 5986474 (W.D. Tex. Sept. 13, 2023); *Ricks v. Lumpkin*, No. 4:20-CV-1299-O, 2023 WL 8224931 (N.D. Tex. Sept. 26, 2023); *Cruz-Garcia v. Lumpkin*, No. 4:17-CV-3621, 2023 WL 6221444 (S.D. Tex. Sept. 25, 2023); *Brown v. Lumpkin*, No. 3:19-CV-2301-L-BN, 2023 WL 5158053 (N.D. Tex. Aug. 10, 2023); *Medina v. Lumpkin*, No. 4:09-CV-3223, 2023 WL 3852813 (S.D. Tex. June 6, 2023); *Granger v. Lumpkin*, No. 1:17-CV-291, 2023 WL 2224444 (E.D. Tex. Sept. 24, 2023); *Johnson v. Lumpkin*, 593 F. Supp. 3d 468 (N.D. Tex. 2022); *Brewer v. Director, TDCJ-CID*, No. 2:15-CV-050-Z-BR, 2022 WL 398414 (N.D. Tex. Feb. 8, 2022); *Gobert v. Lumpkin*, No. 1:15-CV-42-RP, 2022 WL 980645 (W.D. Tex. Mar. 30, 2022); *Cole v. Lumpkin*, No. 4:17-CV-940, 2021 WL 4067212 (S.D. Tex. Sept. 7, 2021); *Holberg v. Davis*, No. 2:15-CV-285-Z, 2021 WL 3603347 (N.D. Tex. Aug. 13, 2021); *Mullis v. Lumpkin*, No. 3:13-cv-121, 2021 WL 3054800 (S.D. Tex. July 20, 2021); *Harper v. Davis*, Civ. No. H-16-762, 2020 WL 3791971 (S.D. Tex. July 7, 2020); *Reynoso v. Davis*, Civ. No. H-09-2103, 2020 WL 2596785 (S.D. Tex. May 21, 2020); *Aranda v. Davis*, No. 6:89-CV-13, 2020 WL 2113640 (S.D. Tex. May 4, 2020); *Guidry v. Davis*, Civ. No. H-13-1885, 2020 WL 9260154 (S.D. Tex. Apr. 13, 2020); *Green v. Davis*, 414 F. Supp. 3d 892 (N.D. Tex. 2019); *Howard v. Director, TDCJ-CID*, No. 1:13-CV-256, 2019 WL 4573640 (E.D. Tex. Sept. 20, 2019); *Broadnax v. Davis*, No. 3:15-CV-1758, 2019 WL 3302840 (N.D. Tex. July 23, 2019); *Russell v. Davis*, No. 4:13-CV-3636, 2019 WL 3302719 (S.D. Tex. July 23, 2019); *McFarland v. Davis*, 4:05-CV-03916, Doc. No. 21 (S.D. Tex. Apr. 2, 2019); *Renteria v. Davis*, No. EP-15-CV-62-FM, 2019 WL 611439 (W.D. Tex. Feb. 12, 2019); *Ramey v. Davis*, 314 F. Supp. 3d 785 (S.D. Tex. 2018); *Ruiz v. Davis*, No. 3:12-CV-5112, 2018 WL 6591687 (N.D. Tex. Dec. 14, 2018); *Luna v. Davis*, Civ. No. SA-15-CA-451-XR, 2018 WL 4568667 (W.D. Tex. Sept. 24, 2018); *Gonzales v. Davis*, No. 7:12-CV-126-DAE, ECF No. 163 (W.D. Tex. Apr. 13, 2018); *Sparks v. Davis*, No. 3:12-CV-469-N, 2018 WL 1509205 (N.D. Tex. Mar. 27, 2018); *Jackson v. Davis*, No. 4:15-CV-208, ECF No. 89 (S.D. Tex. Mar. 6, 2018); *Gardner v. Director, TDCJ-CID*, No. 1:10-CV-610, Doc. No. 93 (E.D. Tex. Mar. 1, 2018); *Hummel v. Davis*, No. 4:16-CV-133-O, 2018 WL 276331 (N.D. Tex. Jan. 3, 2018); *Alvarez v. Davis*, No. 4:09-CV-3040, 2017 WL 4844570 (S.D. Tex. Oct. 25, 2017); *Halprin v. Davis*, No. 3:13-CV-1535-L, 2017 WL 4286042 (S.D. Tex. Sept. 27, 2017); *Batiste v. Davis*, Civ. No. H-15-1258, 2017 WL 4155461 (S.D. Tex. Sept. 19, 2017); *Fratta v. Davis*, No. 4:13-CV-3438, 2017 WL 4169235 (S.D. Tex. Sept. 18, 2017); *Wardlow v.*

sentenced habeas petitioners are found by the district court to not have presented any claim that reasonable jurists could debate and that would justify an appeal to the Fifth Circuit. Of the 44 death-penalty cases that have reached the Fifth Circuit after the district court—post-*Buck*—declined to grant a COA from the denial of an initial habeas petition, the Fifth Circuit has granted a COA in only 12.[23] This means the vast majority—roughly two-thirds—of death-sentenced habeas petitioners are denied the opportunity to appeal in the Fifth Circuit.[24]

D. The Fifth Circuit's practice is unfair to capital petitioners.

The Fifth Circuit's practice of "paying lipservice" to the COA standard in published opinions also works a fundamental unfairness to petitioners. *Tennard*, 542 U.S. at 283. This unfairness is particularly evident in this case. At the COA stage, the petitioner is only charged with

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Director, TDCJ-CID, No. 4:04-CV-408, 2017 WL 3614315 (Aug. 21, 2017); *Milam v. Director, TDCJ-CID*, No. 4:13-CV-545, 2017 WL 3537272 (E.D. Tex. Aug. 16, 2017); *Murphy v. Davis*, No. 3:09-CV-1368-L, 2017 WL 1196855 (N.D. Tex. Mar. 31, 2017); *Slater v. Davis*, No. 4:14-CV-3576, 2017 WL 1194374 (S.D. Tex. Mar. 30, 2017); *Robertson v. Davis*, No. 3:13-CV-0728-G, 2017 WL 1178243 (N.D. Tex. Mar. 30, 2017); *Hernandez v. Davis*, No. EP-15-CV-51-PRM, 2017 WL2272495 (W.D. Tex. May 23, 2017); *Nelson v. Davis*, No. 4:16-CV-904-A. 2017 WL 1187880 (N.D. Tex. Mar. 29, 2017); *Thompson v. Davis*, Civ. No. H-13-1900, 2017 WL 1092309 (S.D. Tex. Mar. 23, 2017); *Dennes v. Davis*, Civ. No. H-14-0019, 2017 WL 1102697 (S.D. Tex. Mar. 22, 2017).

[23] *Holberg v. Lumpkin*, 2023 WL 2474213 (5th Cir. 2023); *Mullis v. Lumpkin*, 47 F.4th 380 (5th Cir. 2022); *Aranda v. Lumpkin*, 2021 WL 5627080 (5th Cir. 2021); *Spicer v. Cain*, 2021 WL 4465828 (5th Cir. 2021); *Nelson v. Davis*, 952 F.3d 651 (5th Cir. 2020); *Broadnax v. Davis*, 813 F. App'x 166 (5th Cir. 2020); *McFarland v. Davis*, 812 F. App'x 249 (5th Cir. 2020); *Dennes v. Davis*, 797 F. App'x 835 (5th Cir. 2020); *Ramey v. Davis*, 942 F.3d 241 (5th Cir. 2019); *Luna v. Davis*, 793 F. App'x 229 (5th Cir. 2019); *Thompson v. Davis*, 916 F.3d 444, 456 (5th Cir. 2019); *Alvarez v. Lumpkin*, No. 18-70001, Doc. No. 80 (5th Cir. June 18, 2021).

[24] *Rubio v. Guerrero*, 2025 WL 1455001 (5th Cir. 2025); *Cruz-Garcia v. Guerrero*, 128 F.4th 665 (5th Cir. 2025); *Ricks v. Lumpkin*, 120 F.4th 1287 (5th Cir. 2024); *Brown v. Lumpkin*, 2024 WL 5484989 (5th Cir. 2024); *Medina v. Lumpkin*, 2024 WL 3833291 (5th Cir. 2024); *Granger v. Lumpkin*, 2024 WL 3582651 (5th Cir. 2024); *Johnson v. Lumpkin*, 76 F.4th 1037 (5th Cir. 2023); *Gobert v. Lumpkin*, 2023 WL 4864781 (5th Cir. 2023); *Brewer v. Lumpkin*, 66 F.4th 558 (5th Cir. 2023); *Harper v. Lumpkin*, 64 F.4th 684 (5th Cir. 2023); *Cole v. Lumpkin*, 2022 WL 3710723 (5th Cir. 2022); *Reynoso v. Lumpkin*, 854 F. App'x 605 (5th Cir. 2021); *Green v. Lumpkin*, 860 F. App'x 930 (5th Cir. 2021); *Guidry v. Lumpkin*, 2 F.4th 472 (5th Cir. 2021); *Russell v. Lumpkin*, 827 F. App'x 378 (5th Cir. 2020); *Ruiz v. Davis*, 819 F. App'x 238 (5th Cir. 2020); *Renteria v. Davis*, 814 F. App'x 827 (5th Cir. 2020); *Howard v. Davis*, 959 F.3d 168 (5th Cir. 2020); *Gardner v. Davis*, 779 F. App'x 187 (5th Cir. 2019); *Gonzales v. Davis*, 924 F.3d 236 (5th Cir. 2019); *Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018); *Jackson v. Davis*, 756 F. App'x 418 (5th Cir. 2018); *Sparks v. Davis*, 756 F. App'x 397 (5th Cir. 2018); *Hummel v. Davis*, 908 F.3d 987 (5th Cir. 2018); *Hernandez v. Davis*, 750 F. App'x 378 (5th Cir. 2018); *Wardlow v. Davis*, 750 F. App'x 374 (5th Cir. 2018); *Batiste v. Davis*, 747 F. App'x 189 (5th Cir. 2018); *Murphy v. Davis*, 737 F. App'x 693 (5th Cir. 2018); *Milam v. Davis*, 733 F. App'x 781 (5th Cir. 2018); *Slater v. Davis*, 717 F. App'x 432 (5th Cir. 2018); *Fratta v. Davis*, 889 F.3d 225 (5th Cir. 2018); *Robertson v. Davis*, 715 F. App'x 387 (5th Cir. 2017).

establishing that reasonable jurists could debate the district court's resolution of his claims—not convincing the court to resolve the debate in its favor. *Miller-El*, 537 U.S.at 342. Were petitioners to do otherwise, and focus their briefing on prevailing on the merits, they would be encouraging the court to "in essence decid[e] an appeal without jurisdiction." *Id.* at 336–37. In this case, for example, Cruz-Garcia justifiably relied on the Fifth Circuit's previous decision in *Oliver* to establish debatability. The Fifth Circuit, however, denied COA by cabining *Oliver* to its specific facts with no explanation of why every reasonable jurist would do so. At the COA stage, however, Cruz-Garcia had no reason to defend *Oliver* against such a constrained reading. The Fifth Circuit denied Cruz-Garcia permission to appeal by effectively changing the rules in the middle of the game.

E. This case presents an excellent vehicle for addressing the Fifth Circuit's practice of denying a COA by creating precedent to hold an issue not debatable.

This case presents an ideal vehicle for addressing the Fifth Circuit's continued misapplication of the COA standard and its peculiar practice of holding that an issue is not debatable by making new law. The Fifth Circuit conceded that the underlying issue was "unclear," App. A at 7. And *Oliver*'*s* holding that the Bible can constitute an external influence as a matter of clearly established federal law indicates that reasonable jurists could debate the same here. Yet, the court pretermitted the appellate process mandated by § 2253(c) by issuing a precedential decision limiting the Bible as an external influence to circumstances where "the jurors compared the facts of [the] case to . . . specific Bible passage[s]." App. at 8. The Fifth Circuit thus merely paid lipservice to the COA standard while cutting off any further development on an important constitutional issue—all without allowing an appeal.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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