

No. _____

CAPITAL CASE

In the
Supreme Court of the United States

RAYMOND A. LEWIS,
Petitioner,

v.

BRYAN D. PHILLIPS,
Warden of SATF Corcoran Prison,
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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CAPITAL CASE QUESTIONS PRESENTED

The questions presented in this petition are as follows:

- 1) In a death penalty case, does post-trial evidence showing that the jury foreperson told the panel on the fourth day of sentencing deliberations that he considered extra-record evidence of the defendant's religion as a factor in aggravation of a death sentence, and successfully galvanized the holdout jurors to do the same, establish that an extraneous source was introduced into the jury deliberations, entitling the defendant to a hearing under *Remmer v. U.S.*, 347 U.S. 227 (1954)?
- 2) Can the prosecution ever rebut the presumption of prejudice when panel members of a capital sentencing jury resolved a four-day deadlock by considering, as a factor in aggravation of a death sentence, extra-record evidence that the defendant's acceptance of Jesus Christ meant he would experience "everlasting life" regardless of the sentence imposed?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The petitioner is Raymond Anthony Lewis.

The respondent is Brian D. Philips, Warden of the California Substance Abuse Treatment Facility.

Petitioner is not a corporate entity.

STATEMENT OF RELATED PROCEEDINGS

❖ *People v. Lewis*, No. 0389385-6, Superior Court of California, County of Fresno. First Amended Commitment/Judgment of Death entered March 29, 1991.

❖ *People v. Lewis*, No. S020032, 26 Cal.4th 334 (Aug. 2, 2001), Supreme Court of California, rehearing denied Sept. 27, 2001. Certiorari denied, 535 U.S. 1019 (Apr. 22, 2002).

❖ *In re Raymond Anthony Lewis*, No. S083842, Supreme Court of California. Initial petition for writ of habeas corpus denied October 15, 2003.

❖ *Lewis v. Davis*, No. 1:03-cv-06775-LJO-SAB, U.S. District Court for the Eastern District of California. Judgment entered August 20, 2018, Order Dismissing-in-Part and Denying-in-Part Petitioner's Rule 59(e) Motion entered December 13, 2018.

❖ *Lewis v. Andes*, No. 19-99001, 95 F.4th 1166 (Mar. 12, 2024), U.S. Court of Appeals for the Ninth Circuit. Order denying petition for panel rehearing and rehearing en banc entered August 6, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Raymond Anthony Lewis respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

INTRODUCTION

Raymond Lewis was sentenced to death by a jury that took six days to deliver a guilty verdict and four days to agree on a death sentence. On the fourth day of the sentencing deliberations, the jury foreperson, who had already decided to vote for a death sentence and was openly growing impatient with the others, introduced a new extra-record evidentiary factor for the holdout jurors to consider in support of a death sentence: that based on Mr. Lewis's mitigation evidence that he had been "exposed to Jesus Christ" while awaiting trial, he would experience "everlasting life" regardless of the sentence the jury imposed. "Right after" this extraneous influence was introduced into the deliberations, the jury unanimously agreed upon a death sentence.

Mr. Lewis's jailhouse conversion to Christianity had been introduced as evidence in mitigation of a death sentence at the sentencing phase of his trial. The State did not introduce evidence or argument that Mr. Lewis's Christian faith should be treated as an aggravating factor in support of a death verdict and Mr. Lewis was unaware of, and could not confront, the evidence and argument presented by the foreperson for the first time in the jury room.

More than seventy years ago, this Court instructed that postconviction courts presented with evidence that a jury was exposed to an extraneous influence tending

to the prejudice the defendant must presume prejudice and hold a hearing to determine the circumstances of the exposure and the impact of the exposure on the jury. Ultimately, it is the government's burden to establish that there was not prejudice.

But in this case, Mr. Lewis challenged the jury's exposure to an improper extraneous influence in a motion for new trial filed only two months after the jury's verdict was read, supported by proffers of evidence from two of the jury panel members and incriminating letters sent to trial counsel by the offending jury foreperson; and his request for a new trial was denied along with his request for a hearing to question the jurors and establish whether they were prejudiced by the extraneous influence. The trial court refused to consider the evidence that was presented along with the new trial motion, holding it was irrelevant and inadmissible under state law because it did not evidence misconduct on the part of the foreperson. The California Supreme Court affirmed, and the lower federal courts found Mr. Lewis failed to overcome the 28 U.S.C. § 2254(d) relitigation bar.

Mr. Lewis's Sixth and Fourteenth Amendment right to a full hearing at which the presumption of prejudice attaches has been denied for thirty years because of an unreasonable fact determination by the trial court, affirmed by the California Supreme Court. Mr. Lewis asks that the Court grant certiorari, vacate the Ninth Circuit's denial of a certificate of appealability ("COA"), and remand for further proceedings consistent with the procedures mandated in *Remmer v. U.S.*, 347 U.S. 227 (1954) (hereafter "*Remmer I*").

OPINION BELOW

The March 12, 2024, opinion of the Ninth Circuit Court of Appeals is published at 95 F.4th 1166 (9th Cir. 2024). A copy is attached as Appendix B.

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment on March 12, 2024. A Petition for Panel Rehearing and Rehearing En Banc was denied by the Ninth Circuit on August 6, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On November 7, 2024, Justice Kagan extended the time to file the petition until January 3, 2024. The petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

❖ The First Amendment to the U.S. Constitution states, in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”

❖ The Sixth Amendment to the U.S. Constitution states, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed [and] to be confronted with the witnesses against him.”

❖ The Eighth Amendment to the U.S. Constitution states, in relevant part: “[C]ruel and unusual punishments [shall not be] inflicted.”

❖ Section One of the Fourteenth Amendment to the U.S. Constitution states, in relevant part: “No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

❖ 28 U.S.C. § 2253(c) states, in relevant part:

(1)(A) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issues 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.

...

❖ 28 U.S.C. § 2254(d) states: “An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim –

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

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

STATEMENT OF THE CASE

A. Trial

On June 9, 1988, Mr. Lewis was charged with the June 7, 1988, capital murder of Sandra Simms in Fresno, California. App'x. C at 41a-42a. Mr. Lewis and Ms. Simms were acquaintances that, along with two others, had been buying and using drugs together on the night in question. App'x. B at 7a. The information alleged the special circumstance that the murder was committed in the course of a robbery and, in aggravation, four prior felony convictions. App'x. C at 42a.

On November 26, 1990, after six days of deliberations, the jury returned a guilty verdict. *Id.* at 4. As the Ninth Circuit describes it, during the penalty phase Mr. Lewis's trial counsel "made a reasonable strategic decision to focus on mercy and lingering doubt about Lewis's guilt rather than his upbringing[.]" Mr. Lewis accordingly presented negligible mitigation evidence; the unprepared testimony of all three family-member mitigation witnesses takes up a total ten pages of transcript. Among those family members, Mr. Lewis's sister testified, *inter alia*, that she believed Mr. Lewis had changed for the better while in jail awaiting trial because he began talking about God and quoting from the Bible. *See* App'x. C at 73a; App'x. B at 14a-15a ("Lewis's sister testified that her brother had changed while in jail, becoming more religious, and 'that she would miss [Lewis] very much if he were executed.'") (citation omitted).

On December 18, 1990, following four days of deliberations, the jury returned a verdict of death. *Id.*

B. Motion for New Trial and Evidentiary Hearing

On February 14, 1991, Mr. Lewis moved for a new trial and requested a hearing pursuant to *Hedgcock v. California*, 51 Cal.3d 395, 417 (1950), to determine whether the jurors had engaged in misconduct during penalty phase deliberations in violation of his First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. App'x. C at 67a. The motion was accompanied by a declaration from juror Jeffrey E., which stated in relevant part that:

all 12 jurors held hands and prayed at the beginning of deliberations at both the guilt and penalty phases and . . .

That at the penalty phase the following occurred [*sic*]:

The second time we voted, our jury foreman, asked why people were having a difficult time making a decision. Sally B[.] said she needed some time to make the right decision, knew what was right, but was having difficulty in voting. Paul [W., the jury foreman,] said he did not know if it would help her, but what had helped him make his decision was that Raymond had been exposed to Jesus Christ and if that was in fact true Raymond would have “everlasting life” regardless of what happened to him. Sometime after that we reached a verdict.

Id.

The supporting memorandum to the motion argued,

[t]he idea that Jury Foreman Paul W[.] convinced holdout juror Sally B[.] that she need not be concerned about putting Raymond to death because Raymond would meet Jesus and have “Everlasting Life” is contrary to the jury instructions and the spirit of the law. It is further clear that “Everlasting Life” was a consideration [Paul W.] had at the penalty phase as well. Therefore this Honorable Court should allow the defense to subpoena [*sic*] jurors [Paul] W[.] and [Sally] B[.] to an evidentiary hearing to determine if jury misconduct occurred.

Lewis v. Davis, No. 1:03-cv-06775-LJO-SAB, Petitioner’s Opening Brief on the Merits at 240-41 (E.D. Cal. Oct. 25, 2011) (hereafter “USDC Opening Brief”).

Mr. Lewis also presented the court with a post-trial letter that foreperson Paul W. had sent to lead trial counsel Neal Pedowitz, warning him of the dangers of focusing his representation on the murder charge itself rather than placing the highest concern on “get[ting] [his relationship with God] settled in [his] own life:”

. . . Though difficult, I can understand some what [*sic*] your belief that Raymond is not guilty and your strong desire to uncover anything that might give you and Raymond a glimmer of hope. The problem, as I see it, with your efforts, is that you personally have no assurance of your own position regarding your ultimate purpose in life and your ultimate position with God for eternity. You, no doubt, have strong opinions in these areas but do you have a real inner peace (assurance) about them? I am not talking about religion. I am talking about relationship with a personal God who loves you and has a plan for your life.

You believe that Raymond is not guilty of murder as charged. I believe that he is guilty of murder as charged. Someday you, I, and Raymond will all equally stand before our God and the question He will ask all of us will not be about murder, it will be, did you accept my Son Jesus Christ and the penalty He paid to forgive all the sins you committed. A “no” answer to that question will be much worse than being guilty of a murder charge and the penalty will be much worse than losing [*sic*] your physical life. It will be eternal “death” and separation from God.

Mr. Pedowitz, your continued efforts on behalf of Raymond Lewis will make much more sense and certainly be more fruitful if and when you get these issues settled in your own life. “If” there is a “missing clue” to be found or shred of hope for Raymond to receive an LWOP sentence, you need the wisdom that only God can give, to help you with your efforts. This can only come through a personal relationship with God and He has made it possible through Jesus Christ. . . .

Id. at 241 (emphasis in original). The letter was accompanied by the book “Born Again” by Charles Colson. *Id.* A letter sent to Mr. Pedowitz a week prior had asked for a “chance to meet with Ramond [*sic*] and discuss some thoughts and feelings I have with him.” *Id.*

Mr. Lewis also made a proffer of testimony he would present from his investigator, Jimmy Hayes, relating to a conversation that Mr. Hayes and Mr. Pedowitz had with foreperson Paul W., who refused to sign a declaration:

Mr. Hayes is going to testify [Paul W.] told both of us that he had made this statement to Sally B[.], and Sally B[.] was the holdout juror, and that there was another juror besides Sally B[.], who [Paul W.] wouldn't identify, that that juror also heard these statements being made, and that right after the statements were made another vote was taken and it decided to kill my client.

Id. at 242. Also at the hearing, Mr. Pedowitz expressed his opinion that Paul W.'s letter directed anti-Semitic sentiments at him as a Jewish man who had not accepted Jesus Christ. *Id.*

The trial court denied the request for a hearing, refused to consider Jeffrey E.'s declaration, the letters, and the proffered testimony, and denied Mr. Lewis's motion for a new trial, finding there were no disputed issues of fact, the letters from foreperson Paul W. were irrelevant to the question of juror misconduct, and the declaration from juror Jeffrey E. was inadmissible under California Evidence Code section 1150(a). App'x. C at 67a-68a. The court noted that "a statement by a juror during deliberation may itself be an act of misconduct in which case the evidence of that statement is admissible [under section 1150(a)]," but found Paul W.'s statements did not evidence any misconduct. USDC Opening Brief at 243.

C. Automatic Appeal

On direct appeal, the California Supreme Court affirmed the trial court's rulings, finding no material disputed facts and agreeing that the evidence was inadmissible. *Id.* at 243-44. The Court's bedrock holding was that foreperson Paul W.

committed no misconduct by making the relevant statements to juror Sally B., reasoning, *inter alia*, that:

Contrary to defendant's contention, by referring to Jesus Christ and defendant's possible everlasting life, Paul W. did not improperly refer to an extraneous source – his personal religious beliefs or a code that mandated a particular code of conduct – to influence Sally B.'s vote. (citation omitted). "The introduction of much of what might strictly be labeled "extraneous law" cannot be deemed misconduct. The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated." *People v. Riel*, 22 Cal.4th 1153, 1219 (2000)].

That jurors may consider their religious beliefs during penalty deliberations is also to be expected. . . .

. . .

We find nothing in the record, moreover, that suggests the jurors disregarded the law or the court's instructions, and instead imposed a higher or different law. *People v. Sandoval*, [4 Cal.4th 155, 193 (1992).] The fact that some jurors expressed their religious beliefs or held hands and prayed during deliberations may have reflected their need to reconcile the difficult decision—possibly sentencing a person to death—with their religious beliefs and personal views. *See Jones v. Kemp*, [706 F.Supp. 1534, 1560 (N.D. Ga. 1989)]. But it does not show that jurors supplanted the law or instructions with their own religious views and beliefs. *See People v. Sandoval, supra*, 4 Cal.4th at [194]. ("We do not mean to rule out all reference to religion or religious figures so long as the reference does not purport to be a religious law or commandment.") "We will not presume greater misconduct than the evidence shows." *In re Carpenter*[, 9 Cal.4th 634, 657 (1995).]

Contrary to defendant's contention, we disagree that Paul W.'s statement that defendant may have "everlasting life" contradicts the jury instruction that states, in defendant's words, life means life and death means death. Everlasting life obviously does not exist in the

physical world. In that regard, Paul W. did not dispute that death does not mean death, but instead was referring to spiritual everlasting life, a commonly understood expression of religious belief and faith. We assume that Sally B. perceived the difference between physical and spiritual everlasting life in light of the jury instruction. . . .

People v. Lewis, 26 Cal.4th 334, 389-90 (2001) (emphasis in original).

Accordingly, the Court rejected Mr. Lewis's challenge based on his Sixth and Fourteenth Amendment rights to due process and trial by jury; his argument that the jurors had a diminished sense of responsibility when deciding on the appropriate sentence in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 328-30 (1985); and his challenge based on his Eighth and Fourteenth amendment rights to a reliable, individualized capital sentencing determination. *Id.* at 391.

D. Federal Habeas Corpus Proceedings

Mr. Lewis raised the claim in his federal habeas corpus petition, arguing that the California Supreme Court's decision was both contrary to and an unreasonable application of clearly established federal law, and that the decision was based on several unreasonable determinations of fact.

The federal district court did not make a merits determination, finding instead that Mr. Lewis failed to satisfy the relitigation bar imposed by 28 U.S.C. § 2254(d) on any of his constitutional arguments. Regarding the argument that foreperson Paul W.'s comments improperly inserted extraneous evidence into the jury's sentencing deliberations, the district court held:

Paul W.'s noted statements and comments reasonably could be seen to reflect his personal religious views and deliberative process rather than extrinsic information forbidden to jurors. As that [*sic*] California Supreme Court has noted jurors at the sentencing phase have the duty to make a normative decision including individual moral and ethical

considerations on the various sentencing factors. [*People v.*] *Danks*, 32 Cal.4th [269], 311 [(2004), *as modified* (Apr. 14, 2004)]. Because Paul W.’s statements reasonably could be seen as deliberative rather than improper extrinsic evidence, Petitioner’s argument that Sally B.’s sentence selection was swayed thereby is unavailing.

App’x. C at 73a-74a. The district court’s holding was at least partially premised on its belief that Mr. Lewis bore the burden of rebutting a presumption that jurors follow the law as instructed. *Id.* at 34. *Citing Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Lockhart v. McCree*, 476 U.S. 162, 178 (1986) (“[I]mpartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts.”) (*quoting Wainwright v. Witt*, 469 U.S. 412, 423 (1985)). The Court did not address the *Mattox-Remmer* framework for evaluating an extraneous influence claim.

The district court also found that the evidence supported a reasonable state court finding that Mr. Lewis’s Eighth Amendment right to an individualized sentencing determination under *Zant v. Stephens*, 462 U.S. 862, 879 (1983), was not violated, because Mr. Lewis failed to show that the jury was improperly influenced by religion in reaching its sentencing verdict. App’x. C at 74a.

The district court further held that Mr. Lewis failed to show that due process entitled him to an evidentiary hearing on this claim in state court, and that,

the California Supreme Court reasonably determined on the record before it that Paul W.’s statement during deliberations that Jesus Christ equals everlasting life, implying that Petitioner would have [sic] everlasting life if given the death sentence, was not a statement of non-evidentiary fact that caused his fellow jurors to ignore jury instructions that death meant death and life meant life[], and did not undermine the jurors’ sense of the importance of their sentencing verdict in violation of *Caldwell v. Mississippi*. 472 U.S. 320, 328-329 (1985) (“[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the

responsibility for determining the appropriateness of the defendant's death rests elsewhere.”).

Id. at 36.

Finally, the district court found that Paul W.'s statements did not influence sentence selection because the jurors did not improperly consider his jailhouse conversion to Christianity as “an aggravating factor, a reason for imposing the death penalty.” *Id.* at 38-39. According to the court, the “record reasonably could suggest that juror Sally B[.] had made up her mind how she would vote even before Paul W. offered his personal religious observation,” because Sally B.'s voir dire response indicated that although she did not like the death penalty, she considered it necessary and stated she could impose the death penalty based on the evidence presented at a trial. *Id.* According to the district court, although the timing of changes in jury votes following the introduction an extraneous influence could be relevant to a prejudice inquiry, “Paul W.'s statements did not amount to extrinsic evidence, and Petitioner's proffer is unenlightening as to the chronology of subsequent jury voting.” *Id.* at 39.

The district court and Ninth Circuit both refused to issue a COA. In its denial of a COA, the Ninth Circuit refused to reach the question whether the California Supreme Court's opinion was contrary to or an unreasonable application of *Mattox v. U.S.*, 146 U.S. 140 (1892), or *Remmer I*, *supra*, 347 U.S. 227. App'x. B at 38a. According to the Ninth Circuit, the “*Mattox-Remmer* framework” requires a court to first consider whether extraneous evidence was “possibly prejudicial.” *Id.* at n.13 (quoting *Godoy v. Spearman*, 861 F.3d 956, 962 (9th Cir. 2017) (en banc) (quoting *Mattox*, 146 U.S. at 157)). “If the court finds the possibility of prejudice, the

extraneous evidence is ‘deemed presumptively prejudicial,’ and the burden shifts to the State to show that the jury’s consideration of the extraneous evidence was harmless.” *Id.* (quoting *Remmer*, 347 U.S. at 229). The Court refused to conduct a *Mattox-Remmer* inquiry because it found the California Supreme Court reasonably concluded that the jury did not consider an extraneous source.

The Ninth Circuit also refused to countenance Mr. Lewis’s arguments that foreperson Paul W.’s statements showed religious discrimination in the jury room, asserting incorrectly that Mr. Lewis failed to support his arguments with Supreme Court authority published before the 2001 California Supreme Court decision. *Id.*¹

¹ In fact, Mr. Lewis cited the following pre-2001 cases in favor of his arguments related to religious discrimination: *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Bd. of Educ. Of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687m 728 (1994) (Kennedy, J., concurring in the judgment); *Mattox v. U.S.*, *supra*, 146 U.S. 140; *Remmer v. United States*, *supra*, 347 U.S. 227.

His citations to more recent decisions of this Court were also fairly presented to show clearly established federal law at the time of the California Supreme Court decision because the relevant language in those decisions merely reaffirmed longstanding law as determined by this Court. For instance, Mr. Lewis cited *Buck v. Davis*, 580 U.S. 100 (2017), for its holding that it is “a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.” *Id.* at 123. This is hardly a legal concept the Court announced for the first time in 2017. *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017), and *Williams v. Pennsylvania*, 579 U.S. 1 (2016), were also presented for their recognition of longstanding constitutional protections afforded defendants at trial.

Finally, he also cited directly to the First and Fourteenth Amendments directly, and to federal circuit and state cases applying clearly established law before 2001. *Lewis v. Davis*, No. 19-99001, Appellant’s Opening Brief at 107-111 (9th Cir. Jul. 14, 2022).

REASONS FOR GRANTING THE WRIT

“[I]t is the law’s objective to guard jealously the sanctity of the jury’s right to operate as freely as possible from outside unauthorized intrusions purposefully made.” *Remmer v. U.S.*, 350 U.S. 377, 382 (1956) (hereafter “*Remmer II*”). But in this case, the California Supreme Court held that consideration of a capital defendant’s destiny, as a Christian, to experience “everlasting life” regardless of the imposition of a death sentence—introduced to the jury in the jury room, during sentencing deliberations, after a four-day deadlock, and with the stated purpose of encouraging the holdout jurors to vote for a death sentence—is not an extraneous influence on jury deliberations. See *Mattox, supra*, 146 U.S. at 157. Because of this erroneous fact-finding, found to be reasonable by the lower federal courts, Mr. Lewis has not had a hearing on or received a merits analysis of his claim of juror misconduct. Accordingly, it remains unknown whether and to what extent Mr. Lewis’s Christian conversion, which was introduced by him at trial as a factor in mitigation of a death sentence, was considered by the jury in aggravation of a death sentence.

The failure to hold a hearing on this issue contravenes the clear dictate of *Remmer I, supra*, 347 U.S. at 229, and violates Mr. Lewis’s fundamental constitutional rights to confrontation, cross-examination, and the assistance of counsel; the free exercise of his religion; a reliable, individualized capital sentencing by a jury that acts with full knowledge of and respect for the gravity of its decision; and equal protection and due process of law.

The Court should grant certiorari because this case involves an important question of federal law, the answer to which Mr. Lewis submits dates to the founding

of the Republic: Mr. Lewis has an unqualified constitutional right to have his capital sentence determined without consideration of his Christian religion as a factor in aggravation of a death sentence. Because this inalienable right was violated, he is entitled to a new trial, and at least to a hearing at which the presumption of prejudice attaches. *Id.*

A. Clearly Established Federal Law Mandates that When a Capital Sentencing Jury Considers Extraneous Evidence of the Defendant's Religious Destiny as a Factor in Aggravation of a Death Sentence, a Presumption of Prejudice Attaches and a Hearing at Which the State May Rebut the Presumption is Required.

Though the Court rarely grants certiorari when the asserted error in a petition involves erroneous factual findings, the starting point for the assessment of Mr. Lewis's claim must be the California Supreme Court's unreasonable prefatory finding that foreperson Paul W. did not introduce an extraneous source into the sentencing deliberations. Not only is the Court's finding an unfair and unreasonable reading of the evidence, but because of it, the state and federal courts have denied Mr. Lewis the process and protections to which he is constitutionally entitled under this Court's *Mattox-Remmer* framework.

1. Jury Foreperson Paul W. did Influence the Jury by Introducing an Extraneous Source into the Sentencing Deliberations.

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v.*

Louisiana, 379 U.S. 466, 472-73 (1965). In 1892, this Court held that trial courts presented with evidence that this fundamental right was threatened will at times be required to make an exception to the general rule that jurors may not be called upon to give testimony impeaching their own verdicts. *Mattox v. U.S.*, *supra*, 146 U.S. at 148 (noting that the advancement of this principle dates to an opinion from this Court issued in 1851). The Court distinguished the types of evidence that may and may not be presented through juror testimony:

. . . on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors, as to the motives and influences which affected their deliberations, is inadmissible either to impeach or support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.

Id. at 149 (quotation and citation omitted).

In *Mattox*, the alleged extraneous influences were a newspaper article containing damaging information about the defendant and a statement by the bailiff that the victim in the case was the third person the defendant had killed. *Id.* at 150-51. In finding that the trial court improperly excluded juror affidavits attesting to their exposure to these external sources, this Court focused not on where the extraneous influence originated but rather on the potential of the non-evidentiary information to prejudice the defendant:

The jury in the case before us retired to consider of their verdict on the 7th of October, and had not agreed on the morning of the 8th, when the newspaper article was read to them. It is not open to reasonable doubt that the tendency of the article was injurious to the defendant. [] Nor can it be legitimately contended that the misconduct of the bailiff could have been otherwise than prejudicial. [] We should therefore be

compelled to reverse the judgment because the affidavits were not received and considered by the court[.]

Id. at 150-51.

Since *Mattox*, this Court has reaffirmed that juror testimony must be admitted and considered at a hearing in support of a motion for new trial when (1) the alleged influence came from outside the trial proceedings, denying the defendant his or her right to confront the evidence and cross-examine witnesses with the assistance of counsel, and (2) the alleged influence has a facial tendency to prejudice the defendant, *i.e.* to result in an unfavorable verdict. *Remmer I, supra*, 347 U.S. at 228-30; *Parker v. Gladden*, 385 U.S. 363, 365 (1966); *Smith v. Phillips*, 455 U.S. 209, 217.

Jury foreperson Paul W.'s statement plainly meets both criteria. The State did not introduce evidence of Mr. Lewis's Christian faith as an aggravating factor in support of a death sentence; nor, of course, could the State have done so under California law or the United States Constitution. In fact, the only evidence of Mr. Lewis's Christian conversion came from his sister, as mitigation evidence to support the defense argument of mercy at sentencing. Even less likely to come from the witness stand would have been testimony that one reason for imposing death is that, as a believer in Jesus Christ, Mr. Lewis will have everlasting life regardless of the sentence imposed, thus reducing the weight of the decision whether to end his mortal life. But this is exactly the testimony the jury considered from Paul W. when, after four days of deadlocking, all twelve jurors agreed to sentence Mr. Lewis to death.

Because neither Mr. Lewis's religious piety nor his eternal soul were issues raised by the State in aggravation of a death sentence, yet the evidence shows that

those issues were given aggravating weight by the jury, Mr. Lewis was denied a fair opportunity to confront the evidence against him and to cross-examine Paul W. regarding the evidence and the information he put forth regarding the relative insignificance of Mr. Lewis's mortal life vis-à-vis his after-life. Most importantly, Mr. Lewis was not able to move for the preclusion of evidence of his "everlasting life," or any argument thereupon; motions that would have succeeded under both state and constitutional law.

Regarding the second *Mattox* factor, the tendency of Paul W.'s statement was clearly injurious to Mr. Lewis's defense against the imposition of a death sentence. Paul W.'s comments were made to the rest of the panel four days after they had retired to deliberate, following Paul W.'s expression of frustration that the jury was taking too long to agree upon a verdict. He at that point had already decided to sentence Mr. Lewis to death, but Sally B. and at least one other juror had not yet reached a decision. Juror Sally B. told Paul W. that she "knew what was right" but needed further time to deliberate. Rather than giving her that time, to which she was undeniably entitled, Paul W. introduced an extra-record evidentiary factor to consider—the relative unimportance of Mr. Lewis's mortal life because as a Christian who had been exposed to Jesus Christ he would experience "everlasting life." The statement was made for the express purpose of "helping" Sally B. and other holdout juror(s) reach a decision to vote for the death penalty by lowering the stakes of that decision. Paul W. had also taken the "fact" of Mr. Lewis's eternal life into account in reaching his own decision to sentence Mr. Lewis to death.

Not only was the statement that Mr. Lewis would experience everlasting life regardless of the sentence he received intended to divert the holdout jurors from their duty to render studied sentencing decisions based on the evidence presented in court, but according to juror Jeffrey E. and Paul W. himself, the effort apparently succeeded. The jurors agreed to sentence Mr. Lewis to death “right after [Paul W.’s] statements were made.” USDC Opening Brief at 242-44. “It is not open to reasonable doubt that the tendency of [Paul W.’s comments] was injurious to the [Mr. Lewis].” *Mattox v. U.S.*, *supra*, 146 U.S. at 150.

In finding that Mr. Lewis had no right to an evidentiary hearing, the California Supreme Court misrepresented Mr. Lewis’s argument. Contrary to what has been asserted in all of the opinions below, Mr. Lewis has not argued that Paul W.’s statement was an improper extraneous source because it exposed the jury to the fact of Paul W.’s religious beliefs, or even because Paul W. and possibly other jurors consulted their own religious beliefs as part of their moral reckoning with the weight of the decision whether to give Mr. Lewis the death penalty. Those issues may well be “internal” factors excluded from postconviction challenge through juror testimony.

Rather, Mr. Lewis has consistently argued that Paul W. improperly inserted evidence and argument into the deliberations that, solely by reason of Mr. Lewis’s religion, the decision whether to preserve Mr. Lewis’s life should be relatively less significant compared to the decision whether to preserve the lives of those who had not accepted Jesus Christ, those who would not experience “everlasting life.” To the extent there could be any doubt that the statement concerned Mr. Lewis’s religious

faith—and the destiny of his eternal soul—and not the jurors’ own religious faith, one need only ask whether Paul W. could have made the statement he did if they were deliberating on the appropriate sentence of someone who had introduced mitigating evidence of a different religious faith, or someone whose religious beliefs were unknown. It was clearly Mr. Lewis’s Christianity that prejudiced him in favor of a death sentence.

The jurors’ religious faith is only relevant to the extent that it is evidence that Paul W.’s statement was prejudicial, *i.e.* that it was injurious to Mr. Lewis in the selection of the appropriate sentence. In many jury rooms, the individual jurors would not be moved by an argument that a Christian’s mortal life was relatively unimportant because of his eternal afterlife. But we know from juror Jeffrey E.’s declaration and Paul W.’s assertions to trial counsel that Mr. Lewis’s jurors were moved. Undeniably, Paul W. himself was moved by this consideration, but Mr. Lewis also produced evidence showing a broader prejudicial impact: he showed that the jurors held hands and prayed before they began their guilt and penalty phase deliberations, indicating a tendency to accept an argument by their foreman that regardless of their decision Mr. Lewis will experience everlasting life; and he offered evidence of the even more suggestive fact that a four-day deadlock was resolved in favor of death “right after” the statement regarding Mr. Lewis’s everlasting life was made, a clear indication that the factor was taken into account by the holdout jurors.

The California Supreme Court briefly considered whether Paul W.’s conduct may have specifically influenced juror Sally B.’s deliberations, and the Court found

there was no evidence that it could have done so. Not only was the analysis an exercise in futility—requiring Mr. Lewis to prove harm before granting him the opportunity to prove harm—but the finding was simply insupportable based on the evidence before the Court. The Court “assume[d] that Sally B. perceived the difference between physical and spiritual everlasting life in light of the jury instruction,” and concluded, based on that assumption, that she must have both limited her consideration to the evidence presented at trial and appreciated the gravity of her responsibility to decide the fate of Mr. Lewis’s physical life. App’x. D at 393a. But there is no evidentiary basis for the Court’s assumption. The un rebutted evidence shows that Sally B. changed her vote from undecided to in favor of death right after Paul W. instructed her and the rest of the panel with the considerations of Mr. Lewis’s Christian faith and eternal afterlife. To determine whether that facial showing of prejudice could be rebutted, the Court was required to hold a hearing, where Mr. Lewis could question Sally B. and the other holdout jurors.

Moreover, untested assumptions like the California Supreme Court made are inappropriate in the *Mattox-Remmer* framework. No doubt one of the reasons the Court has made it so easy to secure a hearing on this issue is that prejudice from extraneous influences is a fact- and case-specific inquiry. It was unfair to Mr. Lewis, and a violation of his due process rights, to dismiss his allegations without first holding a hearing, and instead applying an objectively reasonable person standard to the case-specific question before the Court.

Finally, the Court ignored Mr. Lewis’s evidence that there was a second, unnamed, holdout juror and that Paul W. himself told trial counsel he had also swayed that juror’s opinion in favor of a death sentence.

The determinative question in this case may be whether a capital defendant is entitled to fewer constitutional protections when the sentencing jury considers non-evidentiary testimony that asserts the defendant’s mortal life has less value because he is a “good” person—in this case a Christian who will experience everlasting life—than when the jury considers non-evidentiary testimony that asserts the defendant’s mortal life has less value because he is a “bad” person—for instance, if Paul W. and the rest of the panel believed that Christians had lesser souls. *See, e.g., Tharpe v. Sellers*, 583 U.S. 33, 34-35 (2018) (*per curiam*) (juror affidavit that stated juror wondered whether “black people even have souls . . . presents a strong factual basis for the argument that [petitioner]’s race affected [the juror’s] vote for a death verdict”).

The latter testimony, if discussed and considered as a part of the deliberations, would undoubtedly be treated as a prejudicial extraneous influence on the jury’s decision-making because it clearly discriminates against the defendant based on his religious beliefs. And although there is a very real difference between the two scenarios in our commonsense, everyday experience of “discrimination,” since the former scenario celebrates Mr. Lewis because of his religion and the latter denigrates him because of it, the well-settled law of this Court can broker no such distinction in the assessment of a constitutional juror misconduct claim: both extra-evidentiary

testimonies prejudice the defendant in the determination of the proper sentence because both place a lower value on the defendant's mortal life because of his religious beliefs. Perhaps the fact that the jurors shared Mr. Lewis's religion, rather than being antagonized by, it has confused the state and lower federal courts in their assessment of this claim, which clearly falls within the *Mattox-Remmer* framework.

The extraneous influence in this case also came from a juror, someone technically "internal" to the deliberations. But the fact that the jury foreperson, rather than someone external to the deliberations, was responsible for introducing the extraneous source is a non-issue. This Court has since confirmed what was evident, but not explicit, in the *Mattox* Court's analysis: that the question whether a source is external or internal to the jury room is not literal, but rather "based on the nature of the allegation." *Tanner v. U.S.*, 483 U.S. 107, 117 (1987); *id.* at 117-18 ("Clearly a rigid distinction based only on whether the event took place inside or outside the jury room would have been quite unhelpful."). Several circuit courts had issued opinions faithfully applying *Tanner* well before the California Supreme Court rendered its opinion in this case. *See, e.g., Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) ("we find no discernible distinction to be made based solely on the source of the information") (emphasis in original); *U.S. ex. rel. Owen v. McMann*, 435 F.2d 813 (2nd Cir. 1970) (affirming grant of habeas relief where several jurors had reported to others unfavorable incidents in petitioner's life that were unrelated to the charges); *Mottram v. Murch*, 458 F.2d 626 (1st Cir. 1972) (habeas relief granted where four jurors had previously heard evidence in an earlier trial they were not entitled to

hear in second trial); *U.S. v. Howard*, 506 F.2d 865 (5th Cir. 1975) (hearing required where juror told others the defendant had been in trouble before); *U.S. v. Perkins*, 748 F.2d 1519 (11th Cir. 1984) (convictions reversed where juror told others he knew defendant and knew where witnesses lived); *Hard v. Burlington Northern R.R.*, 812 F.2d 482 (9th Cir. 1986) (hearing required where juror told others of railroad's settlement practices, which constituted the introduction of an extraneous influence); *Lawson v. Borg*, 60 F.3d 608 (9th Cir. 1995) (habeas relief affirmed where juror told others petitioner was "very violent" and "had a violent temper"); *U.S. v. Swinton*, 75 F.3d 374 (8th Cir. 1996) (remand for hearing where juror told judge another juror informed panel of defendant's criminal record during deliberations); *U.S. v. Herndon*, 156 F.3d 629 (6th Cir. 1998) (hearing required where juror recalled during deliberations that he may have had prior dealings with defendant); *U.S. v. Davis*, 177 F.3d 5552 (6th Cir. 1999) (remand for *Remmer* hearing where alternate juror expressed to others his fear of reprisal if there was a conviction); *U.S. v. Humphrey*, 208 F.3d 1190 (10th Cir. 2000) (remand for full inquiry where juror told others about defendant's bad reputation; improper for trial judge to conduct ex parte examination of foreperson and insufficient to only question foreperson).

Based on the unrebutted evidence Mr. Lewis presented the trial court in support of his motion for new trial, the California Supreme Court's finding that foreperson Paul W. did not introduce an extraneous source into the jury deliberations, which had the tendency to prejudicially influence the jury against Mr. Lewis in the determination of the proper sentence, was objectively unreasonable. Because of the

Court's unreasonable prefatory finding, Mr. Lewis has been denied his procedural rights under the *Remmer I*, namely a presumption of prejudice and a full and fair hearing at which the State must prove that the influence was harmless.

2. Because Jury Foreperson Paul W. Introduced an Extraneous Influence into the Sentencing Deliberations, Clearly Established Federal Law Entitles Mr. Lewis to a Presumption of Prejudice and a Hearing on his Jury Misconduct Claim.

The procedures that a postconviction court must follow when presented with evidence that an extraneous source was introduced into jury deliberations has been clearly laid out by this Court. *Remmer I, supra*, 347 U.S. 227. The court must initially treat the extraneous influence as presumptively prejudicial, because “[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions.” *Id.* at 229. The burden then shifts “heavily” to the “Government to establish, after notice to and hearing of the defendant, that such [extraneous influence] was harmless to the defendant.” *Id.* The trial court may not hear the State’s evidence *ex parte*. *Id.* at 229-30. At the hearing, the court should “determine the circumstances, the impact thereof upon the juror[s], and whether or not it was prejudicial[.]” *Id.* at 230.

This procedure has not been modified, or even required much clarification or commentary from the Court, since it was announced seventy years ago. *See Smith v. Philips, supra*, 455 U.S. at 215 (in a juror bias case, citing *Remmer* for the proposition that “[t]his Court has long held that the remedy for allegations of juror [misconduct] is a hearing . . .”). *See also, supra*, pp. 215-216 (list of circuit court cases applying the *Remmer I* procedural framework when shown evidence that jurors introduced

extraneous sources into deliberations). In *Smith v. Philips, supra*, the Court extended *Remmer*'s requirement of a hearing to states through the due process clause of the Fourteenth Amendment. 455 U.S. at 218.

As noted above, the trial court denied Mr. Lewis's request for a hearing and refused to consider the evidence he presented in support of his motion for new trial because it unreasonably found that Paul W. did not introduce an extraneous influence into the jury deliberations when he—apparently successfully—urged the holdout jurors to vote for death at least in part because Mr. Lewis would experience “everlasting life” no matter what the jury did. Mr. Lewis has shown above that the California Supreme Court's opinion affirming the trial court was unreasonable because under the clearly established law of this Court the jury was plainly exposed to an extraneous source. *See Parker, supra*, 385 U.S. at 364 (expressions of a bailiff not subjected to confrontation, cross-examination or other safeguards, introduced to the jury as “private talk, tending to reach the jury by outside influence,” are extraneous influence that, if prejudicial, mandate a new trial).

Mr. Lewis is entitled to a presumption that the jury was prejudiced against him in its sentencing determination by the introduction of extra-record evidence of his eternal life, and he is entitled to a hearing at which the burden will be on the State to show that the misconduct was harmless. *Remmer I*, 347 U.S. at 229.

3. Because the California Supreme Court’s Affirmance of the Trial Court’s Denial of an Evidentiary Hearing was Based on an Unreasonable Determination of the Facts in Light of the Evidence Before it, Mr. Lewis has Overcome the 28 U.S.C. § 2254(D)(2) Relitigation Bar and May be Granted Relief in Federal Habeas Corpus.

In 28 U.S.C. § 2254(d), Congress set forth certain bars to the grant of federal habeas corpus relief, even in situations where the federal courts find that a claim of constitutional error merits relief. The language of subsections 2254(d)(1) and (d)(2) is in the disjunctive, leaving courts free to grant relief where only one of the subsections has been satisfied. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (granting relief after finding petitioner satisfied (d)(2) without mentioning (d)(1)).

The deferential language in section 2254(d)(2) has been interpreted by this Court as a caution against federal courts supplanting “reasonable” factual determinations of state courts with their own fact findings when they reach different conclusions. *See Wood v. Allen*, 558 U.S. 290, 201(2010). Therefore, “[i]f reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court’s [] determination.” *Brumfield v. Cain*, 576 U.S. 305, 313 (2015) (internal quotation and citation omitted). But requiring that federal courts accord state courts substantial deference “is not a rubber stamp.” *King v. Emmons*, 144 S.Ct. 2501 (Jul. 2, 2024) (Jackson, J., joined by Sotomayor, J., dissenting from denial of certiorari). “[D]eference does not imply abandonment or abdication of judicial review,’ and ‘does not by definition preclude relief.” *Brumfield, supra*, 576 U.S. at 313 (quoting *Miller-El v. Dretke*, 537 U.S. 322, 340 (2003)). A state court finding is not necessarily reasonable just because a judge

could, or even did, make it. To interpret such a high bar to relief under subsection 2254(d)(2) would relegate federal habeas courts to an advisory role.²

In *Brumfield v. Cain*, the petitioner sought a state-court hearing on his *Atkins* claim, which the state court denied at the same time that it denied the claim on the merits. The state law in question required a hearing “when an inmate has put forward sufficient evidence to raise a ‘reasonable ground’ to believe him to be intellectually disabled.” *Id.* at 309. Based on its review of the evidence the petitioner had presented to the state court, this Court was “compel[led] to conclude that both of [the state court’s] factual determinations were unreasonable.” *Id.* at 314. In finding that subsection 2254(d)(2) was satisfied, the Court emphasized that although the state court denied both the request for an evidentiary hearing and the claim on the merits, the only question before it was whether it was reasonable to deny the request for an evidentiary hearing:

To be sure, as the dissent emphasizes,[] other evidence in the record before the state court may have cut against [petitioner’s] claim of intellectual disability. . . . It is critical to remember, however, that in seeking an evidentiary hearing, [petitioner] was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, [petitioner] needed only to raise a “reasonable doubt” as to his intellectual disability to be entitled to an evidentiary hearing. . . . [I]n light of the evidence of [petitioner’s] deficiencies, none of the countervailing evidence could be said to foreclose all reasonable doubt.

² And, indeed, last term this Court issued an opinion in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), which calls into question whether the Court’s current interpretation of AEDPA deference under section 2254(d) unconstitutionally “compels judges to abdicate their Article III ‘judicial power’” to interpret the constitution. *Id.* at 2274 (Thomas, J., concurring).

Id. at 320-21 (internal citation omitted).

The facts here compel the same conclusion. First, as a practical matter, the Court in *Brumfield* was reviewing a state court interpretation of a state law that established the procedures the state courts were required to follow when presented with a postconviction claim of intellectual disability. This Court specifically left it to each state to determine, within constitutional bounds, the procedures it will employ to implement its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Id.* at 317. But in *Remmer I*, the Court established the procedures for states to follow when presented with claims of an extraneous influence on a jury's decision-making. The California Supreme Court, adopting the trial court's procedural and merits rulings, did not follow those procedures.

Second, the standard for entitlement to a hearing under *Remmer I* is as low as, if not even lower than, the state standard for an *Atkins* hearing at issue in *Brumfield*. Mr. Lewis was only required to show that a private communication occurred, directly or indirectly, with a juror about a matter pending before the jury, in other words that there was a non-evidentiary source introduced into the jury's deliberations. *Remmer I*, *supra*, 347 U.S. at 229 (citing *Mattox*, *supra*, 146 U.S. at 148-50; *Wheaton v. U.S.*, 133 F.2d 522, 527 (8th Cir. 1943)). That showing alone entitled him to a presumption of prejudice and an evidentiary hearing to determine whether "such contact with the juror was harmless[]." *Id.* No reasonable jurist could conclude that Mr. Lewis did not satisfy this low standard by presenting evidence showing that foreperson Paul W.

inserted Mr. Lewis's religion, and his religious destiny after his mortal life ends, as a factor for the deadlocked jurors to consider in favor of a death sentence.

Because the trial court was presented with ample evidence that Mr. Lewis's Christian faith was taken into consideration as a factor in support of a death sentence, the California Supreme Court's finding that he failed to present evidence of an extraneous source that he was given no opportunity to confront or explain was unreasonable and overcomes the subsection 2254(d)(2) relitigation bar. Mr. Lewis therefore respectfully asks that the Court grant certiorari, vacate the Ninth Circuit's denial of a COA, and a remand for further proceedings consistent with *Mattox*, *supra*, 146 U.S. 140, and *Remmer I*, *supra*, 347 U.S. 227.

B. The Prejudice Inherent When a Jury Considers a Capital Defendant's Religion as a Factor in Aggravation of a Death Sentence is Irrebuttable, and Mr. Lewis is Entitled to a New Sentencing Trial.

Mr. Lewis presented the trial court with sufficient evidence to determine, without the benefit of a hearing, that the extraneous influence in this case was not harmless. Because Mr. Lewis satisfies 28 U.S.C. § 2254(d)(2) on this claim, this Court may reverse the Ninth Circuit's denial of a COA and reach the merits of the claim. *See Buck v. Davis*, 580 U.S. 100, 128 (2017) (after finding COA was improvidently denied, reaching the merits of claim and remanding for implementation of substantive decision). There is precedent for the Court granting a new trial on a *Mattox-Remmer* claim when the record before it is adequate to do so and a remand would be overly burdensome.

In *Remmer*, after announcing the required procedures for trial courts to follow when presented with allegations of an extraneous influence on the jury deliberations, the Court remanded to the federal district court for a hearing. *Remmer II, supra*, 350 U.S. at 377-78. *Remmer* was a tax fraud case. *Id.* After his conviction, the petitioner filed a motion for new trial alleging that one of the jurors on his panel had been approached by a third party with the suggestion that he could earn money by making a deal with the petitioner. *Id.* at 378. Later investigation revealed that a client of the juror had told him he knew the petitioner and suggested the deal in passing. *Id.* at 380. In response, the juror shut down discussions and brought the incident to the district court's attention. *Id.* at 378. The court told the juror to consider the incident as a "joke." *Id.* However, the district attorney asked the FBI to investigate possible wrongdoing by the juror's client and the juror was interviewed as part of that investigation. *Id.* The petitioner did not learn of the incident until after trial, when details were published in the newspaper. *Id.* 378.

On remand, the district court, apparently misinterpreting the instructions from this Court, held a hearing but considered only whether the FBI investigation had affected the trial. *Id.* 378-79. The court found that the investigation "was entirely harmless as far as the petitioner was concerned and did not have the slightest bearing upon the integrity of the verdict nor the state of mind of the foreman of the jury, or any members of the jury." *Id.* at 379.

This Court found that the district court improperly limited its mandate, which, in the Court's words, was to "hold a hearing, with the petitioner and counsel present,

to determine from the facts whether or not the communication with the juror by the outsider and the events that followed were prejudicial and, therefore, harmful to the petitioner, and, if so, to grant a new trial.” *Id.* “It was the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged by petitioner which, in our view, made manifest the need for a full hearing.” *Id.* at 379. Nonetheless, rather than remanding the case a second time for a full hearing, the Court found there was sufficient evidence in the record to make a merits determination. *Id.*

In *Remmer*, the impacted juror approached the judge and related the incident, *id.* at 380, a fact showing self-awareness and a sense of responsibility, which would normally augur against a finding of prejudice. Moreover, the extraneous source had placed pressure on the juror to vote in favor of the defendant, not against him. *Id.* It also appears the juror testified that his verdict had not been influenced by the source. *See, generally, id.* Nonetheless, the Court found that the tendency of this type of incident to prejudice a defendant was so great that “neither [the juror] nor anyone else could say that he was not affected in his freedom of action as a juror.” *Id.* at 381. “He had been subjected to extraneous influences to which no juror should be subjected, for it is the law’s objective to guard jealously the sanctity of the jury’s right to operate as freely as possible from outside unauthorized intrusions purposefully made.” *Id.* at 382. The Court thus indicated that at least in some cases the presumption of prejudice cannot be rebutted.

Mr. Lewis presents a stronger case for a prejudice finding based on the current record. As a practical matter, Mr. Lewis was convicted thirty-three years ago and this claim was first raised and rejected only two months after trial, in early February 1991. A hearing at this point would be unlikely to produce much, if any, new evidence, and it would be unfair to fault Mr. Lewis for the failure to hold a hearing despite his diligent efforts over the past thirty-plus years. Moreover, the evidence presented in 1991 was unrebutted by the State despite it having the opportunity to do so. Two jurors provided information in 1991 indicating that the jury's unanimous death verdict came shortly after Paul W.'s comments; Paul W. himself purportedly told trial counsel the holdout jurors changed their vote to death "right after" he encouraged them to take Mr. Lewis's "everlasting life" into consideration. Jeffrey E. said the unanimous verdict came "sometime after" Paul W.'s statements.

Even if Paul W.'s statement had no influence on the holdout jurors—as unlikely as that scenario is—there can be no doubt that his own verdict had been influenced by the extra-evidentiary "fact" of Mr. Lewis's eternal Christian life. Paul W.'s post-trial letters to lead counsel Pedowitz openly state that the only penalty he gave serious consideration was the penalty non-Christians would receive for refusing to accept Jesus Christ:

Someday you, I, and Raymond will all equally stand before our God and the question He will ask all of us will not be about murder, it will be, did you accept my Son Jesus Christ and the penalty He paid to forgive all the sins you committed. A "no" answer to that question will be much worse than being guilty of a murder charge and the penalty will be much worse than losing [sic] your physical life. It will be eternal "death" and separation from God.

USDC Opening Brief at 241 (emphasis in original).

Because Mr. Lewis had accepted Jesus Christ, in Paul W.'s mind, he could never truly receive a "death" sentence:

'If there is a 'missing clue' to be found or a shred of hope for Raymond to receive an LWOP sentence, you need the wisdom that only God can give, to help you with your efforts. This can only come through a personal relationship with God and He has made it possible through Jesus Christ.

Id. (emphasis in original). Whether the other jurors were persuaded by Paul W.'s statements, Paul W.'s statement evidences his own misconduct in considering and being influenced by an extraneous source. Mr. Lewis "was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker v. Gladden, supra*, 385 U.S. at 366.

In *Mattox*, the Court found it availing that the jury remained undecided the morning after retiring for deliberations, which is when the prejudicial extraneous source was introduced. *Supra*, 146 U.S. at 150-51. Here, the extraneous source was introduced on the fourth day of deliberations, by the jury foreman, after expressing his frustration that the jury had not agreed on a sentence, and with the express purpose of "helping" the holdout jurors vote for death. It was also introduced to a jury of twelve persons that all held hands and prayed before their deliberations, which combined with the timing of the holdout jurors' death verdicts, indicates its likely effect.

In *Parker v. Gladden, supra*, the bailiff in charge of an Oregon criminal jury made comments to the jurors about the defendant's bad character and guilt. He told

one juror that if there was anything wrong with the jury's verdict, this Court will fix it. 385 U.S. 363-64. The trial court found the comments prejudicial, but the Oregon Supreme Court reversed. *Id.* at 364. This Court reinstated the grant of relief, describing the bailiff's comments as "'private talk,' tending to reach the jury by 'outside influence,'" and thus violative of the Sixth and Fourteenth Amendment guarantee of confrontation, cross-examination and counsel. *Id.* (quoting *Patterson v. People of State of Colorado*, 205 U.S. 454, 462 (1907)). The Court also found that the "unauthorized conduct of the bailiff 'involve[d] such a probability that prejudice will result that it is deemed inherently lacking in due process.'" *Id.* at 365. (quoting *Estes v. State of Texas*, 381 U.S. 532, 542-43 (1965)).

The State had submitted in *Parker* that there was no prejudice to the petitioner because ten jurors had testified they had not heard the bailiff's comments and, at the time, Oregon allowed a guilty verdict by a vote of only ten jurors. *Id.* at 365. Thus, the petitioner would almost certainly have been convicted even without the bailiff's extraneous influence. The Court rejected this argument, finding prejudicial impact from (1) the official character of the bailiff, who "beyond question carries great weight with a jury which he had been shepherding for eight days and nights;" (2) the fact that the jury deliberated for 26 hours, showing a difference of opinions as to the guilt of the petitioner; and (3) testimony by one juror that she was prejudiced by the statements. *Id.*

The facts of this case compel the same conclusion that the Court reached in *Parker*. As noted above, the jury deliberated for four days on the appropriate sentence

for Mr. Lewis and abruptly reached an agreement on a death sentence shortly after foreperson Paul W. inserted Mr. Lewis's religion into the deliberations. Clearly, until Paul W. spoke up, there was a difference of opinion on the appropriate sentence. It is also significant that the jury had deliberated for six days on the question of Mr. Lewis's guilt, indicating that during sentencing deliberations, after the defense had strenuously argued lingering doubt, some of the jurors likely struggled with the question whether Mr. Lewis had even committed the underlying murder.

Moreover, although no jurors were called upon to give testimony as to the impact of Paul W.'s comments, Paul W. gave evidence that was proffered to the trial court showing that his own death verdict was influenced by Mr. Lewis's religion. Contextual evidence from Jeffrey E. and trial counsel's proffer indicate that others, too, were influenced—others who had held out on reaching a verdict for four days. And finally, though Paul W. did not have an “official character” like that of a bailiff, he was the jury foreman, and thus was likely perceived as a leader inside the jury room. He had “shepherded” the jury through six days of guilt-phase deliberations, and four days of penalty-phase deliberations.

In addition to the violation of Mr. Lewis's Sixth and Fourteenth Amendment rights to confrontation, cross-examination and counsel, the nature of the extraneous influence here also discriminated against Mr. Lewis on the basis of his religion, violating the First Amendment's free exercise clause and the Fourteenth Amendment's equal protection clause. *See Zant v. Stephens, supra*, 462 U.S. at 885

(it is constitutionally impermissible for a state to assign religion as an aggravating factor in a capital sentencing scheme).

Mr. Lewis's Eighth Amendment right to an individualized sentencing by a jury that appreciates the gravity of its decision was also abrogated. This Court has placed certain Eighth Amendment limits on the imposition of capital punishment, which are "rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Caldwell v. Mississippi*, *supra*, 472 U.S. at 329 (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976)). One of the assumptions that this Court relies on to uphold the states' use of capital punishment is "that capital sentencers w[ill] view their task as the serious one of determining whether a specific human being should die at the hands of the State." *Id.* "Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id.* at 330 (quoting *Woodson v. North Carolina*, *supra*, 428 U.S. at 305).

The assumption has been rebutted here. The evidence shows that Sally B. and possibly other holdout jurors were, indeed, treating their role as capital sentencers as the "awesome responsibility" that it was. Before foreperson Paul W.'s interference,

they had spent four days contemplating the appropriateness of a death sentence for Mr. Lewis. But Paul W.’s insertion of the consideration of Mr. Lewis’s “everlasting life” regardless of the sentence imposed abruptly cut that studied contemplation short. In those circumstances, it cannot be said that the jurors who sentenced Mr. Lewis to death “act[ed] with due regard for the consequences of their decision” *Id.* (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)).

This Court noted that the risk of prejudice from a delegation of sentencing responsibility to a higher power is the greatest when the jury is divided: “Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.” *Id.* at 333. Mr. Lewis could not conjure a set of facts more illustrative of the truth of the Court’s warning than he has presented here.

Mr. Lewis has aptly satisfied the requirements for a new trial under the *Mattox-Remmer* framework: the extraneous evidence of Mr. Lewis’s “everlasting life” based on his acceptance of Jesus Christ was introduced into the sentencing deliberations in the jury room, where Mr. Lewis had no chance to confront the evidence or cross-examine its source with the assistance of counsel; and the evidence was introduced to influence—and did influence—the holdout jurors, after a four-day deadlock, to sentence him to death. The jury’s consideration of Mr. Lewis’s eternal afterlife as a factor in aggravation of a death sentence violated his First, Sixth, Eighth, and Fourteenth Amendment rights. The only way to ensure that Mr. Lewis

is not put to death because of his Christian faith is to grant him a new sentencing hearing.

CONCLUSION AND PRAYER FOR RELIEF

Foreperson Paul W.'s statements were unquestionably extraneous to the evidence presented at trial and unquestionably prejudiced Mr. Lewis in the selection of the appropriate sentence. The California Supreme Court's holding otherwise was based on a fundamentally flawed fact-finding and the federal courts should decide, de novo, whether the State can rebut the presumption of prejudice. For that reason, the petition for writ of certiorari should be granted.

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