

No. 06-70006

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**KHRISTIAN OLIVER,
Petitioner-Appellant,**

vs.

**NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,**

Respondent-Appellee.

**On Appeal from the United States District Court for the
Eastern District of Texas (Beaumont Division)**

**BRIEF FOR *AMICUS CURIAE* FOUNDATION FOR MORAL LAW ON
BEHALF OF RESPONDENT-APPELLEE,
SUPPORTING AFFIRMANCE**

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CERTIFICATE OF INTERESTED PERSONS

No. 06-70006

KHRISTIAN OLIVER,
Petitioner-Appellant,
v.
NATHANIEL QUARTERMAN,
Respondent-Appellee.

The undersigned counsel of record certifies that no persons in addition to those listed by the parties to this case have an interest in the outcome of the case. *Amicus curiae* Foundation for Moral Law, Inc., is a designated IRS Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Benjamin D. DuPré

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law (“the Foundation”) is a non-profit, religious liberties, public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God, especially when exercised by citizens acting in public capacities. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country’s laws and justice system. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning religious freedom, the sanctity of life, and others that implicate the fundamental freedoms enshrined in our Bill of Rights, including briefs in two prior cases before this Court.¹

The Foundation has an interest in this case because it believes that the Bible represents a source of spiritual inspiration, moral direction, and solace, qualities that are immensely helpful in jury deliberations—especially deliberations implicating the death penalty. A ruling for Petitioner could have a severely detrimental effect on jurors who base their religious convictions on the Bible, excluding them from the civic duty of jury service that the Founders’ believed to be vital to America’s political and legal systems. This brief primarily focuses on

¹ See *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (*en banc*); *Staley v. Harris County, Tx.*, 485 F.3d 305 (5th Cir. 2007) (*en banc*).

whether the history and text of the “impartial jury” clause of the Sixth Amendment permits holding that juror consultation of the Bible prejudices the jury’s verdict.

SOURCE OF AUTHORITY TO FILE

Pursuant to F.R.A.P. Rule 29(a), all parties have consented to the filing of this *amicus* brief.

STATEMENT OF THE ISSUE

Whether, as a matter of law, the jurors' consultation of the Bible in the jury room constituted an external influence that raises a presumption of prejudice under clearly established federal law, as determined by the Constitution of the United States?

SUMMARY OF ARGUMENT

While Petitioner and Respondent focus on the nuances of Federal Rule of Evidence 606(b) regarding what constitutes an external influence on the jury's deliberations, *Amicus* seeks to focus the Court's attention on the broader point of what embodies an "impartial jury" according to the Sixth Amendment as it relates to the Bible in the jury room. Given that United States Supreme Court precedent does not provide clear direction on this issue, it is imperative that the Court return to the Founders' understanding of the right to trial by jury. Such consideration reveals that jurors were intended to serve as representatives of the community in the legal system, bringing their individual experiences, backgrounds, and beliefs to bear on the decisions they were asked to make. Moreover, the legal system of the founding era repeatedly referenced the Bible and biblical principles, thus juror reference to the same would have been completely normal and even expected.

Today juries retain the key characteristic of being a cross-section of the community. The strength of the jury system is that it uses ordinary citizens to render judgment on the accused, citizens possessing a variety of knowledge, backgrounds, and beliefs. In a country that still contains a large number of Bible-believers, it is not surprising that some jurors would call upon a resource that provides them with moral clarity, comfort, and inspiration during deliberations. This is especially true in capital sentencing deliberations as the Supreme Court and

other courts have recognized that jurors must exercise *moral* judgment in such deliberations. To rule that the presence or consultation of the Bible in the jury room raises a presumption of prejudice regarding the jury's verdict would demonstrate a misunderstanding of the jury system and impose a religious litmus test for jury service. Fidelity to the Constitution demands that the Sixth Amendment's requirement of an "impartial jury" not exclude biblically literate jurors.

For these reasons, the decision of the district court should be affirmed.

ARGUMENT

“[J]urors who consider their personal religious values in a death penalty case are not engaged in jury nullification. They are not choosing to ignore the law. They are following it.”

Gerald F. Uelman, *Catholic Jurors and the Death Penalty*, 44 J. Cath. Legal Stud. 355, 375 (2005).

I. THE DEARTH OF PRECEDENT REGARDING WHETHER THE BIBLE CONSTITUTES AN “EXTERNAL INFLUENCE” ON THE JURY’S DELIBERATIONS DEMANDS A TEXTUAL EXAMINATION OF THE SIXTH AMENDMENT’S RIGHT TO AN “IMPARTIAL JURY.”

This case implicates the constitutional right to an impartial jury protected by the Sixth Amendment, which provides, in pertinent part, that “[i]n 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” U.S. Const. amend VI. This right is protected through several legal mechanisms such as *voir dire*, the jury oath, the rules of evidence, and the jury instructions. Petitioner’s argument and the Court’s questions revolve around the strictures in Rule 606(b) of the Federal Rules of Evidence that permit inquiry into whether any “extraneous prejudicial information” was brought to the jury’s attention or whether any “outside influence” was brought to bear upon any juror during its deliberations. Fed. R. Evid. 606(b). In keeping with Rule 606(b), this Court has “traditionally upheld the position that verdicts should be set aside where it is shown that the

impartiality of jurors may have been affected or where tainted material has come before the jury.” *Farese v. United States*, 428 F.2d 178, 180 (5th Cir. 1970).

However, because the post-trial evidentiary hearing on this matter uncovered innocuous exposure to the Bible during jury deliberations, Petitioner is reduced to arguing that the very presence of the Bible itself and *any* reading of it constitutes “tainted material” that prejudiced the jury’s decision in favor of the death penalty. Such a broad argument makes this case less about the nuances of what constitutes “extraneous prejudicial information” or an “outside influence” and more about the fundamental nature of a jury. In other words, determining whether the Bible’s role in this jury’s deliberation tainted the jury’s sentencing verdict requires an understanding of what the founding generation meant in guaranteeing the right to an “impartial jury.”

At the outset, it is imperative to note that it is impossible to provide a definitive answer from the United States Supreme Court to this Court’s questions in this case because “[t]he Supreme Court has not had occasion to consider whether the use of a Bible in jury deliberations could create a bias of constitutional proportions.” *Robinson v. Polk*, 444 F.3d 225, 229-30 (4th Cir. 2006) (Wilkinson, J., concurring in the denial of reh’g *en banc*). While a few sister courts of appeal and some state courts have wrestled with the issue, no consensus has formed on the

subject. Some courts have exonerated the Bible's use² and others have condemned it,³ yet all have confined their findings to the specific facts in each case.

The dearth of precedent underscores the necessity of understanding the nature of the right at issue in light of the text of the Constitution as it was understood at the time of its adoption. "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). James Madison said that a textual reading of the Constitution requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

The Sixth Amendment's terse language concerning the right to an impartial jury indicates that the term was well understood at the time of the adoption of the Sixth Amendment. Thus, the best method of ascertaining what the Sixth Amendment means by an "impartial jury" in the context of juror consultation of the Bible is to examine the history of the right to trial by jury. *See, e.g., Rhode*

² *See, e.g., Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006); *Fields v. Brown*, 431 F.3d 1186 (9th Cir. 2005).

³ *See, e.g., Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989); *People v. Harlan*, 109 P.3d 616 (Colo. 2005).

Island v. Massachusetts, 37 U.S. 657, 723 (1838) (“In the construction of the constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted.”).

II. JURIES PAST AND PRESENT: PROTECTING AND REPRESENTING THE PEOPLE

A. During the founding era, jurors served as indispensable representatives of the community in criminal cases.

The legacy of the American right to trial by jury began—as did so many other rights—in England.

England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English.

Irvin v. Dowd, 366 U.S. 717, 721-22 (1961) (citations omitted). It traces back to at least the twelfth century in which “any person challenged to trial by battle in a case involving a proprietary right might” consent to “having the question settled by a jury that was carefully chosen to ensure disinterestedness.” Leonard Levy, *Origins of the Bill of Rights* 211 (1999).

Trial by jury was guaranteed in America from the earliest possible date: “[T]he Virginia charter of 1606 contained a provision that was repeated in later charters of Virginia and in the charters of virtually all other colonies, guaranteeing colonists the rights of Englishmen as if they still resided in the mother country,”

including the right to jury trial. *Id.* at 223-24. One of the major complaints in the Declaration of Independence condemned King George III and Parliament “[f]or depriving us, in many cases, of the benefits of trial by jury.” *The Declaration of Independence* para. 20 (U.S. 1776). Twelve states had enacted written constitutions prior to the Constitutional Convention, and the only right that these twelve constitutions declared unanimously was the right of a criminal defendant to jury trial. *See* Levy, at 227. Alexander Hamilton related in the *Federalist Papers* that “[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury.” *The Federalist No. 83* (Alexander Hamilton), at 432 (Carey & McClellan eds., 2001). It is not surprising, then, that both the text of the Constitution⁴ and no fewer than three amendments⁵ in the Bill of Rights emphasize the importance of juries to the American political and legal system.

The unique role of the jury emerged early in its history. By the fourteenth century, when the use of juries in England became widespread, they were considered to be

representative of the community, not that twelve men could possibly include members of every sect, class, or group; yet the theory was that they were a cross-section of the public rather than an organ of any part

⁴ *See* U.S. Const. Art. III, § 2, cl. 3.

⁵ *See* U.S. Const. amend. V, VI, VII.

of it, and no one could be excluded from the panels from which jurors were selected because of membership in some particular group.

Levy, at 216. In fact, “[t]he rule that a jury’s verdict of guilt must be unanimous supposedly reflected the notion that the jury spoke for the community.” *Id.* Only a cross section of the community could truly serve as a jury of one’s peers. *See Ciudadanos Unidos De San Juan v. Hidalgo County Grand Jury Comm’rs*, 622 F.2d 807, 809 (5th Cir. 1980) (quoting *Magna Charta*, Chapt. 39 (1215): “No free man shall be . . . imprisoned . . . or in any way destroyed, except by the lawful judgment of his peers or (and) by the law of the land.”). This notion of community representation is emphasized in the constitutional text: “the Sixth Amendment explicitly guaranteed a jury ‘of the State and district wherein the crime shall have been committed,’ going a step beyond the language in Article III, which required only that jury trials be held somewhere within the state where the crime occurred.” Akhil Reed Amar, *The Bill of Rights* 88 (1998).

For the founding generation, the jury protected ordinary individuals by thwarting the power of overreaching and ambitious prosecutors and judges.

The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. 145, 156 (1968); *see also*, Amar, at 84. As Justice Joseph Story explained in his *Commentaries on the Constitution*, “The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people.” J. Story, 3 *Commentaries on the Constitution* § 1774 (1833), *reprinted in* 4 *The Founders’ Constitution* 407 (Kurland & Lerner, eds. 1987). Jurors served the state, but only for a limited period of time, and as such they did not feel beholden to it. “[T]he criminal petit jury could interpose itself on behalf of the people’s rights by refusing to convict when the executive sought to trump up charges against its political critics (as in the [John Peter] Zenger case).” Amar, at 87.

In addition to acting as a check on government power, juries served to educate citizens on public law and affairs. One prominent Anti-Federalist observed that “the jury trial brings with it an open and public discussion of all causes . . . [and this is] the means by which the people are let into the knowledge of public affairs.” *The Federal Farmer XV* (Jan. 18, 1788), *reprinted in* 4 *Founders’ Constitution* 210 (Phillip Kurland & Ralph Lerner eds., 1987). Many judges took

the occasion of jury charges to educate Americans about the Constitution and laws of the land.⁶ The great observer of early America, Alexis de Tocqueville, noted:

The institution of the jury . . . always preserves its republican character, in that it places the real direction of society in the hands of the governed, or a portion of the governed, and not that of the government. . . . [It] invests the people, or that class of citizens, with the direction of society. . . . The system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage.

Alexis de Tocqueville, 1 *Democracy in America* 293-94 (Phillips Bradley, ed. 1945).

To the founding generation, “[t]he jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.” Amar, at 97. Indeed, Thomas Jefferson believed so strongly in the importance of the jury to the American political and legal systems that he said, “Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.” Thomas Jefferson, Letter to the Abbé Arnoux, (July 19, 1789), in 15 *The Papers of Thomas Jefferson* 282, 283 (Julian P. Boyd, ed. 1958).

⁶ See, e.g., James Wilson, Charge to the Grand Jury for the Circuit Court for the District of Pennsylvania (April 12, 1790), reprinted in 2 *The Documentary History of the Supreme Court, 1789-1800* 34 (Maeva Marcus, ed. 1985); John Jay, Charge to the Grand Jury of the Circuit Court for the District of New York (April 12, 1790), reprinted in 2 *The Documentary History of the Supreme Court, 1789-1800* 26 (Maeva Marcus, ed. 1985); James Iredell, Charge to the Grand Jury of the Circuit Court for the District of Connecticut (April 25, 1795), reprinted in 3 *The Documentary History of the Supreme Court, 1789-1800* 29 (Maeva Marcus, ed. 1990).

Like his contemporaries, Jefferson viewed the jury's representative function in the American legal system as irreplaceable, and the individual make-up of the jurors was an integral part of that function. This meant that each juror brought into the courtroom his or her personal background and experiences. To expunge that individuality would have been unthinkable as it would have deprived defendants of their key advantage in having the jury decide their fate: the ability to relate to the defendant as an ordinary citizen.

B. Contemporary juries retain the key founding-era characteristic of being representative of the community at large.

Fast-forwarding two-hundred years, the notion that jurors serve as representatives of the community who shield the people from overreaching government power and bring their individual characteristics into the deliberations has remained a cornerstone of the legal system. “The primary purpose of the jury in our legal system is to stand between the accused and the powers of the State. . . . [T]he right to jury trial ‘reflect[s] a profound judgment about the way in which law should be enforced and justice administered.’” *Lewis v. United States*, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring) (quoting *Duncan*, 391 U.S. at 155). The jury can serve as this buffer between the government and the defendant precisely because it is made up of ordinary citizens. As Judge Learned Hand once explained:

The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. . . . [S]ince if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove.

United States ex rel. McCann v. Adams, 126 F.2d 774, 775-76 (2d Cir. 1942).

Because of the jury’s unique and vital role as representatives for the community, “[i]t is expected that jurors will bring their life experiences to bear on the facts of the case.” *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1462 (9th Cir. 1989). Stripping jurors of their individuality defeats the point of convening a jury.

[A] complete sanitizing of the jury room is impossible. We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. *These involve the very human elements that constitute one of the strengths of our jury system*, and we cannot and should not excommunicate them from jury deliberations.

United States v. McKinney, 429 F.2d 1019, 1022–23 (5th Cir. 1970) *aff’d on reh’g*, 434 F.2d 831 (5th Cir. 1970), *cert. denied*, 401 U.S. 922 (1971) (emphasis added).

What the Founders believed about juries holds true today: the background and experiences the jurors bring with them are an intended part of the deliberation process.⁷

⁷ See *People v. Marshall*, 790 P.2d 676, 699-700 (Cal. 1990) (“The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their

III. RELIGION IN GENERAL AND THE BIBLE IN PARTICULAR HAVE HEAVILY INFLUENCED THE AMERICAN LEGAL SYSTEM AND ITS JURIES.

“We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The jury is one of those institutions. Upon first consideration, the number 12 seems to be a random one for the size of a jury of peers, yet “twelve was a hallowed number because of the twelve tribes of Israel and the twelve apostles of Christ.” Levy, at 214-15. The Bible has accompanied courtroom oaths from their inception in America. Such oaths nearly always invoke the name of God. The Texas criminal jury oath, for example, provides: “You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, *so help you God.*” Tex. Code Crim. Proc. Art. 35.22 (1966) (emphasis added). Discussing the effects of the jury system, de Tocqueville implicitly referenced Biblical notions when he observed that it “imbues all classes with a respect for the thing judged and with the notion of right. . . . It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged.” Tocqueville, at 295.⁸

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.”).

⁸ See Matthew 7:2, 12 (KJV) (“For with what judgment ye judge, ye shall be judged; . . . Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets.”).

In early America, judges often invoked God when charging the jury with its duties. While riding circuit, Chief Justice John Jay related to juries that

Providence has been pleased to bless the people of this country with more perfect opportunities of choosing, and more effectual means of establishing their own government, than any other nation has hitherto enjoyed; and for the use we may make of these opportunities and of these means we shall be highly responsible to that Providence.

John Jay, Charge to the Grand Jury of the Circuit Court for the District of New York (April 12, 1790), *reprinted in 2 The Documentary History of the Supreme Court, 1789-1800* 26 (Maeva Marcus, ed. 1985).⁹ Also on the circuit, Justice William Patterson told a jury that “while we regret and deplore the occasion, we must be mindful of our duty, and be faithful to our country and its laws, our oaths, our consciences, and our God.” William Patterson, Charge to the Grand Jury for the Circuit Court of the District of Pennsylvania (May 4, 1795), *3 The Documentary History of the Supreme Court, 1789-1800* 41 (Maeva Marcus, ed. 1990). Justice James Iredell, in emphasizing to a jury the importance of being impartial, directly invoked God and Biblical principles, saying that the jury’s contemplation should be

undertaken with dignity and solemnity, that they should be undertaken impartially, being “*no respecter of persons*,”^[10] and that their sole object should be the security and interest of the community at large, disdaining every consideration of private favor or ill will, as alike

⁹ Jay gave this same general charge to each jury he presided over in 1790. *See Documentary History*, at 26.

¹⁰ Acts 10:34; Romans 2:11 (KJV).

incompatible with *eternal principles of justice* and the sublimity of those principles of freedom which regard with an equal eye the richest and the poorest, the most powerful and the most weak, the best befriended members of the community, and those whose sole protection, *under God*, is the justice and humanity of the community itself.

James Iredell, Charge to the Grand Jury of the Circuit Court for the District of Connecticut (April 25, 1795), 3 *The Documentary History of the Supreme Court, 1789-1800* 29 (Maeva Marcus, ed. 1990) (emphasis added).

Stepping back from the jury itself, it is easy to see how the American legal system at large has been influenced from its earliest stages by the Bible. William Blackstone's *Commentaries on the Laws of England* served as "the primary law book in America" from the time of the American Revolution to the Civil War, and in them he perpetually quoted and cited the Bible as a legal authority in almost every field of law. Herbert W. Titus, *God, Man, and the Law: The Biblical Principles* 4 (1994); see W. Blackstone, *Commentaries on the Laws of England* (U. Chi. Facsimile Ed. 1979) (1765). Twelve of the thirteen original colonies adopted the entire Ten Commandments into their civil and criminal laws in various forms. See *Colonial Origins of the American Constitution: A Documentary History* (Donald S. Lutz, ed., 1998). Moreover, scholarship has demonstrated that the founding generation quoted or cited to the Bible far more than any other source in public documents. See Donald S. Lutz, *The Origin of American Constitutionalism* 141-143 (1988).

IV. JUROR CONSULTATION OF THE BIBLE IN CAPITAL SENTENCING DELIBERATIONS DOES NOT CONSTITUTE AN EXTERNAL INFLUENCE THAT RAISES A PRESUMPTION OF PREJUDICE CONCERNING THE JURY'S SENTENCE.

A. An “impartial jury” includes biblically literate jurors.

From the foregoing it is apparent that the American legal system possesses a rich biblical heritage. It should not be surprising given this heritage that “religious values pervade the fabric of our national life.” *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971). Indeed, it would be curious to forbid juror expressions of those values during deliberations. Christianity has been the predominate religion in the country since its founding and biblical statements and ideas have so woven themselves into the tapestry of American culture that they have become the trite phrases of everyday life.¹¹ Given the history and ubiquity of biblical influence in this country, “Bible verses . . . are common knowledge in the sense that they are part of the pool of information that many people possess.” *Fields v. Brown*, 431 F.3d 1186, 1209 (9th Cir. 2005). Knowledge and use of the Bible constitute a part of the community that invariably finds its way into the jury room.

To the founding generation it would make no sense that an “impartial jury” could mean one distilled of religion and the Bible. Historian Perry Miller once noted that, “The Old Testament is truly so omnipresent in the American culture of

¹¹ A few examples of this include analogizing a sports match-up to David and Goliath, labeling someone a “Good Samaritan,” and describing a seemingly perfect place to be like Eden.

1800 or 1820 that historians have as much difficulty taking cognizance of it as of the air people breathed.” Perry Miller, *The Garden of Eden and the Deacon’s Meadow*, *American Heritage*, Dec. 1955, at 54. It was part of who they were and thus part of what they brought to a jury deliberation.

It should be no different now than it was then because jurors still retain their role as the representatives of the community in the courtroom, deciding the fate of the defendant on behalf of society. “To ask that jurors become fundamentally different people when they enter the jury room is at odds with the idea that the jury be ‘drawn from a fair cross section of the community.’” *Robinson*, 444 F.3d at 229-30 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975)).

Claiming that the mere presence or any use of the Bible in the jury room prejudices the jury, as Petitioner does in this case, assumes that the Bible could serve no other purpose for the jurors than as a legal reference manual for imposing “higher law.” Yet, there are several other reasons for jurors to possess and/or use the Bible in deliberations.

Just as a trial participant may solemnize his oath with a Bible, a juror may retain a Bible in the jury room to remind him of the importance of the duty he has sworn to perform. This is no more objectionable than the President keeping a Bible in the Oval Office or a judge having one in chambers. In none of these cases would it be appropriate to presume that the Bible is a replacement for, rather than a reminder of, the individual’s oath to uphold and apply the law.

Beyond emphasizing the serious nature of jury deliberations, a Bible can also provide a juror with the sustenance of faith at a difficult

or even anguished time. For some jurors, daily Bible affirmation, or simply having a Bible nearby, constitutes a crucial aspect of personal identity. And even someone who does not frequently consult the Bible may desire one when faced with the heavy burden of selecting between a lifetime of incarceration or a sentence of death. *The law need not deny the implements of faith to people when they need them the most.* For those who find refuge in its teachings, the Bible can provide the strength to impose whatever punishment the law compels.

Id. at 228 (emphasis added).

B. Use of the Bible is especially relevant to capital sentencing deliberations.

As Judge Wilkinson notes in the above passage, it would be particularly egregious to condemn juror use of the Bible in a death penalty deliberation. Courts have stated time and again that death penalty deliberations are qualitatively different than other types of deliberation. “It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that ‘the individualized assessment of the appropriateness of the death penalty [be] a *moral inquiry* into the culpability of the defendant, and not an emotional response to the mitigating evidence.’” *Saffle v. Parks*, 494 U.S. 484, 492-93 (1990) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)) (other citation omitted) (emphasis added). “[R]easoned, moral judgment [is] inherent in capital sentencing by the jury.” *McKoy v. North Carolina*, 494 U.S. 433, 454 (1990) (Kennedy, J., concurring).¹² “As we have repeatedly stated, the task of

¹² See also, *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring).

jurors at the penalty phase is qualitatively different from that at the guilt phase. At the penalty phase, jurors are asked to make a normative determination—one which *necessarily includes moral and ethical considerations*—designed to reflect community values.” *People v. Danks*, 82 F.3d 1249, 1277 (Cal. 2004).¹³

Weighing aggravating and mitigating circumstances is more than a mechanical exercise. There is a definite moral component to the decision: the jurors in this case were asked to take into consideration “the circumstances of the offense, the defendant’s character and background, and the *personal moral culpability* of the defendant” in deciding whether the circumstances warranted life imprisonment rather than a death sentence. *Texas v. Oliver*, No. 7901-98-5, Trial Court Judgment (Tex. D. April 23, 1999) (emphasis added). For jurors who find the Bible to be part of their moral outlook,¹⁴ or even for jurors who live in a society in which the Bible is commonplace, it should not be shocking—let alone constitutionally impermissible—that they consulted the Bible in making this *moral* decision.

¹³ *Danks* is instructive given that it revolves around a juror reading passages of the Bible that included Numbers 35:16. The Court concluded that the reading of the Bible passages, and even sharing them with other jurors, did not prejudice the jury because “[a]t no time did [she] or anyone else argue or state that Mr. Danks should be put to death because of what that passage of the Bible said.” *Danks*, 82 F.3d at 1274.

¹⁴ Testimony in the evidentiary hearing revealed that jurors who planned to attend church functions and Bible studies after trial brought one or more Bibles into the jury room. 44 Reporter’s Record 49, 55, 60, 73, 81. Thus, it is reasonable to assume that the Bible holds an important place in these jurors’ lives.

As the California Court of Appeals observed in a case concerning a defendant's challenge to references to Jesus Christ and prayers in the jury room,

That jurors may consider their religious beliefs during penalty deliberations is . . . to be expected. "The court in no way means to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen." Given the collective nature of jury deliberations, we do not find it unusual, much less improper, that jurors here may have shared their beliefs with other jurors either through conversations or prayers.

People v. Lewis, 28 P.3d 34, 72-73 (Cal. Ct. App. 2001) (quoting *Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989)). The consultation of the Bible by the jurors in this case represents the same kind of consideration of religious beliefs.

C. Petitioner's argument discriminates against jurors who take their religious beliefs seriously.

In a case such as this one in which there is no cognizable evidence that the jury based its sentencing decision on anything other than the law, ruling in Petitioner's favor would result in a blanket rule that the presence of the Bible or reading even one verse of its content carries the likelihood of prejudicing the jury. Such a rule makes ungrounded assumptions about people's religious beliefs and their ability or inability to distinguish between the law and sources of spiritual and moral inspiration.

The implication is that a person's sincerely held religious beliefs, as evidenced by his or her consultation of the Bible, taints the juror's and the jury's

judgment. This is an insult to both the jurors and to religion. More importantly, it is constitutionally unfathomable given the founding generation's beliefs about the role of the jury—beliefs that remain important for respecting jury verdicts.

Jury service is not antithetical to religious belief, and jurors need not check the objects of their faith at the court-house door. . . . Beyond the disservice to individual jurors, denial of Bibles for personal sustenance risks making jury duty less palatable to communities of faith. The Sixth Amendment does not require a rule that would actively discourage a broad section of our population from productive jury service.

Robinson, 444 F.3d at 229.

History, the Constitution, and common sense regarding the role of the jury demand that this Court reject Petitioner's argument and conclude that juror consultation of the Bible is not an external influence that raises a presumption of prejudice in this case. Like the Oklahoma Court of Appeals, this Court should find the fact that

jurors would discuss the biblical propriety of the death penalty or their religious beliefs while deliberating the death penalty does not create a rebuttable presumption that they considered "extraneous material" in reaching their verdict. We do not find it surprising that "conscientious people who are faced with a life and death decision resort to their religious scruples in reaching such a decision. Such deep introspection neither violates principles of justice nor prejudices the defendant."

Young v. State, 12 P.3d 20, 48-49 (Okla. Crim. App. 2000) (quoting *Bieghler v. State*, 690 N.E.2d 188, 203 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998)).

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court affirm the decision of the district court below denying Khristian Oliver's *habeas corpus* petition because the jury's consultation of the Bible did not constitute an external influence upon their decision to impose the death penalty.

Dated this 24th day of March, 2008.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of this Brief of *Amicus Curiae* have been served on counsel (listed below) for each party, in paper and electronic form, and that seven copies of this Brief of *Amicus Curiae* have been dispatched to the Clerk of the United States Court of Appeals for the Fifth Circuit, by certified U.S. mail,, on this 24th day of March, 2008.

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