

Capital Hypocrisy: Does Compelling Jurors to Impose the Death Penalty Without Spiritual Guidance Violate Jurors' First Amendment Rights?

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In 1992, Dorenda Brokofsky and her fellow jurors found Todd Willingham guilty of setting a fire that killed his children, and sentenced him to death.¹ Willingham was executed by the state of Texas in 2004; however, newfound evidence suggests that he may have been innocent of the crime.² Upon learning of the existence of possibly exonerating evidence, Brokofsky remarked, "I don't like the fact now that maybe this man was executed by our word . . . And I don't like the fact that I may have to face my God and explain what I did."³ This tale demonstrates the profound role that religion plays in capital sentencing: jurors are aware that their decision may result in the death of a human being, and the realization that the jury may have ordered a defendant to his execution on faulty evidence can be spiritually and emotionally traumatizing.⁴ Despite the difficult spiritual decisions⁴ that jurors must make in deciding whether or not to sentence a person to death, several courts have held that jurors should not be able to consult their own Bibles for spiritual guidance during sentencing.⁵

¹ Gabriel Falcon and Randi Kaye, *Willingham juror no longer sure of his guilt in Texas case*, CNN.com, Oct. 15, 2009, available at <http://www.cnn.com/2009/CRIME/10/15/willingham.juror/>.

² *Id.*

³ *Id.*

⁴ *See id.* But see *Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989) (noting that religion should not play a role in sentencing, but citing cases where Biblical evidence was attempted to be introduced).

⁵ *See, e.g., Oliver v. Quarterman*, 541 F.3d 329, 336-40 (5th Cir. 2008). This section of *Oliver* outlines the circuit split, citing to *inter alia*: *United States v. Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008) (Bible is an external influence, but consultation of the Bible does not automatically give rise to a mistrial); *Robinson v. Polk*, 438 F.3d 350, 366 (4th Cir. 2006) (finding consultation of the Bible to be permissible due to its spiritual import to believers); *McNair v. Campbell*, 416 F.3d 1291, 1307-08 (11th Cir. 2005) (finding a presumption of prejudice where the Bible is consulted during deliberations, but also finding that the state successfully rebutted that presumption where it showed that only "innocuous" passages were consulted); *Burch v. Corcoran*, 273 F.3d 577, 591 (4th Cir. 2001) (finding juror consultation of the Bible permissible because the Bible is akin to folk wisdom); *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998) (finding, in dicta, that juror consultation of the Bible may be impermissible); *Jones*, 706 F. Supp. at 1558, 1560 (noting that group consultation of the Bible is impermissible, but leaving open the question of whether or not individual jurors could consult their Bibles for spiritual guidance). Although the cases discussed in this paper specifically address the Bible, any holding that the Supreme Court decides on this issue will necessarily also apply to other religious texts due to the Establishment Clause.

Courts are divided as to whether or not to allow jurors to consult the Bible while engaged in sentencing deliberations.⁶ It is well established that capital sentencing deliberations are different in character than sentencing deliberations in which the death penalty is not available:

It should be understood that much more is involved here than a simple determination of sentence. For the State . . . empowered the jury in this case to answer ‘yes’ or ‘no’ to the question whether this defendant was fit to live. . . . [S]uch a determination is different in kind from a finding that the defendant committed a specified criminal offense.⁷

Opponents of allowing jurors to consult the Bible in capital sentencing deliberations commonly cite the Sixth Amendment: “[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . [and] to be confronted with the witnesses against him.”⁸ Combined, these clauses recognize the importance of a defendant’s ability to rebut the evidence that the jury will use to convict and sentence him while all parties are present in the courtroom.⁹ Some courts consider Bibles used for spiritual guidance to be extraneous evidence that has been injected into sentencing deliberations without the defendant’s knowledge or his opportunity to point out flaws or contradictory passages in biblical interpretation, violating the Sixth Amendment.¹⁰

Without discounting the extraordinary amount of concern that must go into protecting the rights of a criminal defendant, especially where his life is at stake, the rights of the jury are also important considerations. If the government expects citizens to be willing to perform their civic duty and serve as members of a jury, it is important that the government not unduly infringe upon the rights of those jurors. Arguably, when the decision that a juror is called on to make is

⁶ Compare *Lara-Ramirez*, 519 F.3d at 89 (Bible is an outside influence and an analysis of whether or not the Bible constituted reversible error should be conducted as is for any other outside influence) with *Robinson*, 438 F.3d at 366 (Bible is not an improper influence and thus is a permissible source for consultation).

⁷ *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.20 (1968).

⁸ U.S. CONST. amend. VI. See generally Jeremy B. Sporn, *Legal Injection? The Constitutionality of the Bible in Capital Sentencing Deliberations*, 83 TUL. L. REV. 813 (2009) for a discussion of the view that the Bible is impermissible in sentencing deliberations.

⁹ See *infra* Section II(b): Juror Consideration of an Outside Influence Violates a Defendant’s Sixth Amendment Rights, for a thorough explication of the protections afforded a criminal defendant under the Sixth Amendment.

¹⁰ See, e.g., *Lara-Ramirez*, 519 F.3d at 89.

one of such great moral and spiritual import as deciding whether or not to sentence an individual to death, the rights of the jurors should be given the highest regard because the decision must rest on the juror's conscience. One right of jurors that is potentially compromised by preventing jurors from consulting the Bible originates in the First Amendment: "Congress shall make no law . . . prohibiting the free exercise [of religion]."¹¹ Some courts have held that jurors may not consult the Bible, a holding which carries the potential to infringe on the jurors' Free Exercise rights.

Section I of this paper will discuss *Oliver v. Quarterman*, a recent effort to seek Supreme Court review in a case concerning a capital jury consulting the Bible during sentencing deliberations. Section II will discuss the defendant's rights under the Sixth Amendment and why the Bible does not constitute an outside influence that infringes on those rights. Section III will discuss how preventing jurors from consulting the Bible infringes on jurors' Free Exercise rights under the First Amendment. Section IV will conclude with a hypothesis that simply encouraging attorneys to inquire more thoroughly into jurors' beliefs on voir dire is a workable solution that will optimize the protection and balancing of both jurors' and defendants' rights.

Section I: Oliver v. Quarterman: The Supreme Court Again Rejects the Challenge of Setting a Standard for Jurors' Consultation of the Bible for Spiritual Guidance

Juror consultation of the Bible during sentencing deliberations is not a commonly documented occurrence.¹² While there is a fair amount of case law from the lower courts dealing with this issue, the Supreme Court has yet to grant certiorari to rule once and for all whether or

¹¹ U.S. CONST. amend. I. Some courts also hold that jurors may not discuss the Bible during sentencing deliberations, potentially violating jurors' rights under the Free Speech Clause. See *Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989). However, such concerns are beyond the scope of this inquiry and thus are not addressed in this paper.

¹² See *Lara-Ramirez*, 519 F.3d at 88 (noting that *Lara-Ramirez* marked the first case the First Circuit had seen involving the Bible in the jury room, and that all other cases decided on the issue were habeas corpus cases where it had not been discovered that jurors consulted the Bible until after the jury issued its verdict).

not jurors may use the Bible for spiritual guidance during sentencing deliberations.¹³ Recently, the Supreme Court denied certiorari on this issue in *Oliver v. Quarterman*, wherein a jury convicted defendant Khristian Oliver of capital murder committed in the midst of a burglary.¹⁴ Oliver was found guilty of killing his victim by first shooting him, then bludgeoning him with his rifle.¹⁵

Following the jury's guilty verdict and subsequent death sentence, Oliver moved for a new trial, alleging that the jurors had improperly consulted a Bible during sentencing deliberations.¹⁶ Oliver argued that the jurors' consultation of the Bible deprived him of his Sixth Amendment right to be sentenced by a jury untainted by outside influences.¹⁷ A state evidentiary hearing produced conflicting evidence as to whether the Bible was consulted before or after the jury arrived at its sentencing decision, but it was uncontested that the jurors did at some point consult their own personal Bibles both for passages condemning murder ("Thou shalt not kill," for example) and for passages recommending death as punishment for those who commit murder by bludgeoning with an iron instrument as Oliver did.¹⁸ The evidentiary hearing also produced evidence that jurors not only read the Bible silently, but also discussed passages with each other during deliberations.¹⁹

The state trial court found that the jury was not exposed to any undue influences during its sentencing deliberations, thus finding that the Bible did not constitute an outside influence.²⁰ The Texas Court of Appeals agreed, finding that Oliver had not carried his burden of proving

¹³ See *Fields v. Brown*, 503 F.3d 755, 779 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 1875 (2008); *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006), *cert. denied*, 549 U.S. 1003 (2006); *Burch v. Corcoran*, 273 F.3d 577 (4th Cir. 2001), *cert. denied*, 535 U.S. 1104 (2002).

¹⁴ *Oliver v. Quarterman*, 541 F.3d 329, 331 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *id.* at 334.

¹⁸ *Id.* at 332.

¹⁹ *Id.* at 332.

²⁰ *Id.* at 332-33.

that the Bible was an external influence.²¹ Oliver then filed a petition for a writ of habeas corpus in the district court.²² The district court denied the petition, viewing it as a request for an evidentiary hearing to which Oliver was not entitled as a matter of law.²³ The Fifth Circuit affirmed the death sentence after finding that the jury's consultation of the Bible was impermissible but, because the decision was uninfluenced by the Bible, the error was harmless.²⁴

The Fifth Circuit reasoned that the Bible was an external influence because it was not admitted as evidence in the trial, but it could have encouraged the jurors to vote for a sentence of death even if such a sentence were unsupported by the evidence that was admitted at trial.²⁵ The court noted that a strong presumption of prejudice attaches when jurors consult outside evidence, but explained that the appellate court should defer to the state court's findings regarding juror impartiality absent clear and convincing evidence to the contrary.²⁶ Because the findings in the factual record supported the state court's finding that the jury was not influenced by the Bible in its deliberations, the Fifth Circuit deferred to those findings and found the error to be harmless.²⁷

Section II: The Court Protects the Rights of the Defendant by Shielding Jurors from Outside Influences

The Sixth Amendment guarantees an accused the rights to a fair and impartial jury, and “to be confronted with the witnesses against him.”²⁸ Many courts weigh the defendant's rights heavily in deciding that a Bible may not be used in sentencing deliberations, as those courts may

²¹ *See id.* at 332-33.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 344. Oliver also failed to rebut the state court's factual findings that the use of the Bible did not prejudice the jury's decision and as such he was not entitled to relief. *Id.*

²⁵ *See id.* at 340.

²⁶ *See id.* at 335, 342. *See generally* McNair v. Campbell, 416 F.3d 1291, 1307 (11th Cir. 2005) (discussing the presumption of prejudice that attaches when jurors consult extrinsic evidence).

²⁷ *See Oliver*, 541 F.3d at 344-45.

²⁸ U.S. CONST. amend. VI; Robinson v. Polk, 438 F.3d 350, 359, 360 (4th Cir. 2006).

consider the Bible to be a type of outside influence that has not been presented in the courtroom – the defendant has not had an opportunity to rebut its use as evidence.²⁹ These courts, however, overlook the fact that once sentencing deliberations have commenced, a defendant has already been convicted of the crime for which he was accused, meaning that he must give up a substantial number of rights including the right to his liberty. This is not to discount the incredible gravity of a death sentence, nor to equate the convict’s interest in a sentence that is lesser than death with a juror’s interest in consulting the Bible.³⁰ However, it does provide a reason for courts to avoid entirely disregarding the jurors’ rights. Subsection (a) below will give a brief overview of what an outside influence is and why juror consultation of an outside influence is impermissible, while (b) will discuss how juror consultation of outside influences violates the defendant’s Sixth Amendment rights. Finally, subsection (c) will discuss why the Bible is not an outside influence and thus why consultation of the Bible does not violate the defendant’s rights under the Sixth Amendment.

(a) *What is an Outside Influence?*

An outside influence need not be tantamount to evidence.³¹ Under the Sixth Amendment, any type of “private *communication, contact, or tampering . . . with a juror*” is prohibited as an outside influence.³² However in *Robinson v. Polk*, the Fourth Circuit discussed whether or not

²⁹ See *Fields v. Brown*, 503 F.3d 755, 778-79 (9th Cir. 2007).

³⁰ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130, 150 (1994) (quoting *Georgia v. McCollum*, 505 U.S. 42, 61-62 (1992) (Thomas, J., concurring in judgment)).

³¹ See, e.g., *Remmer v. United States*, 347 U.S. 227, 229 (1954) (noting that *any* communication with a juror that is not made via admitting evidence in court is an outside influence). Many courts do not even refer to external sources as evidence at all, but as “external influences” on the decision making process. See, e.g., *Fields*, 503 F.3d at 780. This terminology may signal a distinct recognition that external influence is not evidence, or merely be a linguistic difference having no significance.

³² *Robinson* 438 F.3d at 362 n.13 (citing *Remmer*, 347 U.S. at 229) (emphasis in original).

the Bible is an impermissible outside influence in terms of evidentiary properties.³³ In *Robinson*, the Fourth Circuit noted that a Bible could not be an impermissible external influence because it is not evidence – it does not present information that could bear on a fact at issue in the case.³⁴ The court noted that the definition of “evidence” necessarily involves determination of a fact at issue in the case.³⁵ Because the events of the Bible took place so far in the past, there is no chance that those events could tend to prove or disprove the occurrence of any current event.³⁶

Some courts have distinguished between an outside influence that is deemed pertinent to the case at hand and which helps the jurors make a decision as to the verdict, and an outside influence that is common knowledge, such as a historical maxim or fact that is simply something everyone learns, such as “George Washington was the first President of the United States.”³⁷ The former would be an impermissible communication, whereas the latter is a permissible consideration by jurors.³⁸ Additionally, some courts have focused on the tangibility of the influence, noting that extraneous *materials* that are brought into the courtroom are impermissible, while external *knowledge*, such as knowledge that a juror gleaned in his profession as a doctor, is perfectly permissible.³⁹ In *Burch v. Corcoran*, the Fourth Circuit found that the Bible was more akin to folk wisdom than outside evidence that would tend to supplant the jurors’ abilities to decide the case according to the law of the state rather than the law of the Bible, thus the jury was not improperly influenced.⁴⁰

³³ *See id.* at 363.

³⁴ *See id.* at 363 n.15 (suggesting that in order to be prejudicial, extraneous evidence must bear on a fact at issue in the case).

³⁵ *Id.* at 363.

³⁶ *See id.*

³⁷ *See* *Fields v. Brown*, 503 F.3d 755, 779 (9th Cir. 2007).

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ *See* 273 F.3d 577, 590-91 (4th Cir. 2001).

In line with this observation, courts have distinguished between internal influences and external influences.⁴¹ An external (or outside) influence is one that was introduced outside of the courtroom and which influences jury deliberations.⁴² An internal influence, on the other hand, is one that is neither “extraneous prejudicial information; *i.e.*, information that was not admitted into evidence but nevertheless bears on a fact at issue in the case,” nor “an outside influence upon the partiality of the jury. . . .”⁴³ The distinction between internal and external influences on a jury depends not on location but on the “nature of the allegation.”⁴⁴ Physical and mental incompetence for jury service have been classified as an allegation of improper internal influence, while a juror’s reading a newspaper has been considered an external influence.⁴⁵ A fair distinction, therefore, is between an influence that is internal *to the juror* and an influence that is external *to the juror*.⁴⁶ The trial process provides safeguards against internal influences by allowing for observation of the jurors by the judge, parties, and attorneys; juror removal through the voir dire process; and prompt reporting to the judge of irregularities so that they may be dealt with accordingly.⁴⁷

A wide variety of sources may constitute external influences on a jury’s deliberations, in addition to the obvious communication with the jury outside of the courtroom.⁴⁸ In one case, the court found that videotaping and televising deliberations was an external influence on the jury.⁴⁹ Even though the camera was unmanned, the court still found that the jurors’ perceptions and candor may have been stunted by the knowledge that their deliberations were being widely

⁴¹ See *Robinson*, 438 F.3d at 362 (quoting *Tanner v. United States*, 483 U.S. 107, 117 (1987)).

⁴² *United States v. Jackson*, 549 F.3d 963, 984 (5th Cir. 2008).

⁴³ *Robinson*, 438 F.3d at 363.

⁴⁴ *Tanner*, 483 U.S. at 117-18.

⁴⁵ *Id.* at 118.

⁴⁶ See *id.*

⁴⁷ See *Robinson*, 438 F.3d at 363.

⁴⁸ See *Robinson*, 438 F.3d at 362 n.13.

⁴⁹ 24 TEX. JUR. 3d *Criminal Law* § 3328 (2009) (citing *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194 (Tex. Crim. App. 2003)).

viewed and televised; therefore the court found that the camera was an outside influence because it put external pressures on the decisions of the jury.⁵⁰ Likewise, the presence of an alternate juror in deliberations, who provided input into the decision making process but was not considered an actual juror, was considered an impermissible external influence on the jury's deliberations.⁵¹ Many other instances of impermissible external influences are found in case law, including but not limited to a juror's receipt of a private phone call detailing the defendant's motive for committing the crime for which he was on trial,⁵² a detective's discussion (unrelated to the trial) with three jurors during a recess,⁵³ and a juror's revelation to fellow jurors of his knowledge that the defendant had a reputation for violence.⁵⁴

(b) *Juror Consideration of an Outside Influence Violates the Defendant's Sixth Amendment Rights*

Outside influences on a jury's deliberations potentially violate the Sixth Amendment in two ways: first, the outside communication violates the Sixth Amendment's Confrontation Clause, which secures the right of a defendant to confront any evidence that is presented against him and rebut that evidence with contrary evidence of his own.⁵⁵ Secondly, the outside influence can violate the defendant's right to a fair and impartial jury.⁵⁶ While these two rights are technically separate entities, in terms of consultation of outside influences the analysis is the same – jurors are not permitted to consult outside influences because of fear that the influences will cause juror bias which violates both the Confrontation Clause and the right to a fair and

⁵⁰ *See id.*

⁵¹ *Id.* (citing *Trinidad v. State*, 275 S.W.3d 52 (Tex App. San Antonio 2008)).

⁵² *Fields v. Brown*, 503 F.3d 755, 780 (9th Cir. 2007) (citing *United States v. Armstrong*, 654 F.2d 1328, 1331-33 (9th Cir. 1981)).

⁵³ *Id.* (citing *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 696, 698 (9th Cir. 2004)).

⁵⁴ *Id.* (citing *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995)).

⁵⁵ *See Robinson*, 438 F.3d at 362 n.14.

⁵⁶ *See id.*

impartial jury.⁵⁷ Together, these clauses protect a defendant's right to a verdict that is based solely on the evidence presented at a trial where his rights have been both protected and respected by the judge and adverse parties.⁵⁸ The key ingredient to a fair trial is the defendant's right to cross-examine any and all witnesses about the testimony they may give against him, which the defendant does not have the opportunity to do where the jury has consulted evidence of which the defendant is unaware.⁵⁹

If it is discovered that a jury has been exposed to an outside influence, however, the jury's verdict is not automatically overturned.⁶⁰ Although the important consideration for the determination of undue prejudice resulting from juror consultation of the Bible is whether or not the jury actually took the external evidence into account while it deliberated,⁶¹ the judge is not permitted to elicit such testimony; jurors are not considered competent to testify as to their own subjective decision-making process.⁶² Accordingly, after it has been determined that the jurors did consult outside evidence, the judge must conduct a harmless error inquiry to determine whether or not the defendant's rights were violated.⁶³

In considering whether or not the exposure to external evidence was harmless, courts consider a variety of factors including but not limited to:⁶⁴ actual receipt of the material,⁶⁵ length

⁵⁷ *See id.*

⁵⁸ *See id.* at 359.

⁵⁹ *Id.* at 361 (quoting *Parker v. Gladden*, 385 U.S. 363, 364 (1966)).

⁶⁰ *See Oliver v. Quarterman*, 541 F.3d 329, 340-41 (5th Cir. 2008) (noting that finding a constitutional error is the first step in the analysis, to be followed by a determination of whether that error was harmless).

⁶¹ *See McNair v. Campbell*, 416 F.3d 1291, 1307 (11th Cir. 2005) (noting that the important consideration is whether or not the jurors' consultation of outside evidence was harmless).

⁶² *See* FED. R. EVID. 606(b); *Sassounian v. Roe*, 230 F.3d 1097, 1109 (9th Cir. 2000) ("Therefore, although we may consider testimony concerning whether the improper evidence was considered, we may not consider the jurors' testimony about the subjective impact of the improperly admitted evidence."); 58 AM. JUR. 2d *New Trial* § 420 (2009).

⁶³ *See Oliver v. Quarterman*, 541 F.3d 329, 340-41 (5th Cir. 2008).

⁶⁴ *See Fields v. Brown*, 503 F.3d 755, 779 n.18 (9th Cir. 2007) (citing *Sassounian*, 230 F.3d at 1109; *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995)).

of time the material remained with the jury,⁶⁶ jury discussion and consideration of the material,⁶⁷ the point during the trial at which the outside materials were introduced,⁶⁸ ambiguity in the allegedly prejudicial material,⁶⁹ the admissibility of the material had it actually been introduced into evidence,⁷⁰ the ability of a limiting instruction to cure any resulting prejudice,⁷¹ the context of the trial,⁷² and the amount of prejudice that arose from the material.⁷³ In the case of the Bible as an outside influence, the Fourth Circuit has also suggested that the particular passages consulted should be analyzed to determine if the passages were consulted as a reminder that the jurors must decide the verdict based solely on evidence presented at trial or if the passages signal that the jurors may have been looking for an alternative source of law.⁷⁴

Jurors' consideration of outside evidence is somewhat mitigated by the fact that the instructions that the judge gives to the jury prior to deliberations include a stipulation that the

⁶⁵ See, e.g., *Sassounian*, 230 F.3d at 1109 (finding actual receipt demonstrated by the fact that there was “no doubt” that four jurors testified to receiving phone calls during deliberations from an individual who took blame for the crime supported finding the error not harmless).

⁶⁶ See, e.g., *Lawson v. Borg*, 60 F.3d 608, 612, 613 (9th Cir. 1995) (finding the fact that the jurors had access to the information as of day two of a five-day deliberation sufficient to support a finding that the error was not harmless).

⁶⁷ See, e.g., *Sassounian*, 230 F.3d at 1110 (“Lengthy deliberations preceding the misconduct and a relatively quick verdict following the misconduct strongly suggest prejudice.”); *Lawson*, 60 F.3d at 612 (finding error not harmless where external evidence touched on a matter the jury had asked the court to clarify and had extensively deliberated on). The Ninth Circuit also determined that the discussion of the impermissible evidence began in response to a juror’s request for the “most reasonable reason to convict”; therefore, the court determined that the juror’s conviction was due in large part to the evidence. *Id.*

⁶⁸ See *id.*; *Lawson*, 60 F.3d at 613 (finding that extraneous material introduced during deliberations supports a finding of harm).

⁶⁹ See, e.g., *Sassounian*, 230 F.3d at 1110-11 (noting that the impermissible external evidence “supplied an element of the very issue being deliberated.”).

⁷⁰ See *Jeffries v. Wood*, 114 F.3d 1484, 1491 (9th Cir. 1997) (citing *United States v. Bagley*, 772 F.2d 482, (9th Cir. 1985) (finding no prejudice where the trial judge informed jury that witness was not immunized, because the trial judge did not previously rule that the evidence would be inadmissible).

⁷¹ See, e.g., *Sassounian*, 230 F.3d at 1111 (finding the fact that the judge was not able to mitigate the prejudice caused by the introduction of the extraneous evidence because he was unaware of the jurors’ knowledge of it supportive of a finding of prejudice following the consideration of impermissible external evidence.)

⁷² See *Jeffries*, 114 F.3d at 1493 n.10 (noting that “trial context” is really just shorthand for other factors already on the list, including actual receipt of material, time the information was available to the jury, extent of juror discussion and consideration of material, whether material was considered before or after verdict was rendered, and other issues that indicate the presence or absence of prejudice) (citing *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986).

⁷³ See *Sassounian*, 230 F.3d at 1110 (finding error not harmless where the court explicitly noted that the improper evidence prejudiced the defendant because it went to a specific element of the case).

⁷⁴ See *Oliver v. Quarterman*, 541 F.3d 329, 341 (5th Cir. 2008) (quoting *McNair v. Campbell*, 416 F.3d 1291, 1309 (11th Cir. 2005)).

verdict returned must be based solely on the evidence presented at trial and the law of the state.⁷⁵

In her concurring opinion to *J.E.B. v. Alabama ex rel. T.B.*, Justice O'Connor described the relationship between the judge and the jury as

a kind of compact by which power is transferred from the judge to jury, the jury in turn deciding the case in accord with the instructions defining the relevant issues for consideration. The wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath.⁷⁶

A juror, thus, has a type of moral obligation to herself, the defendant, and the court to follow the judge's instructions and not let any outside influence come to bear in deciding the case at hand.⁷⁷

Indeed, if a juror does *not* follow the judge's directives and considers outside influences, she has no guarantee that, should she find herself in the same unfortunate position as the defendant in the case, her *own* jurors will resist their biases in deciding against her. In a way, this "honor system" approach to juror decision making can be said to increase the American people's faith in the criminal justice system.

(c) *The Sixth Amendment Does Not Protect a Defendant From a Jury Free of Religious Positions on Capital Punishment*

Even after he is convicted, a defendant retains his Sixth Amendment rights, thus making consideration of outside influences that may cause bias or create impartiality in jurors

⁷⁵ See, e.g., *Fields v. Brown*, 503 F.3d 755, 782 (9th Cir. 2007); *Jones v. Kemp*, 706 F. Supp. 1534, 1558, 1559 (N.D. Ga. 1989). It is likely that the jurors do not even realize that in taking a phone call or engaging in a discussion with a detective they were risking learning evidence external to the trial. The information may come to jurors via a third party absent any affirmative request for the material. Of course, that does not mean that jurors *never* go looking for outside information. It is easy to imagine a situation where the crime for which the defendant is on trial may have been committed near a juror's home and the juror stopped by the scene of the crime for extra insight, or the juror did a Google search for one of the defendants while on recess. At the same time, however, those jurors likely did not know they were violating their oath – rather they probably viewed themselves as performing their civic duty to the best of their ability by gathering all available evidence in search of the ultimate truth.

⁷⁶ 511 U.S. 127, 153 (1994) (O'Connor, J., concurring).

⁷⁷ *Id.*

impermissible in the sentencing phase of the trial, as well.⁷⁸ The Supreme Court has made clear that a defendant cannot be executed if he was sentenced to death by a jury chosen solely due to their proclivities towards imposing the death penalty; but the Court has also held that “a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced *general* objections to the death penalty or expressed conscientious or religious scruples against its infliction.”⁷⁹ There is an intricate interplay between the rights of the jurors and the rights of the defendant: the convicted defendant is entitled to a jury that is open to consideration of all the possible penalties that law will allow that jury to impose based on the evidence presented at trial and the law of the state, while the juror is entitled to be fairly considered to serve on such a jury.⁸⁰

A juror who consults the Bible during sentencing is not necessarily attempting to circumvent the law. Data as to why jurors who consult the Bible do so is not widely available. One logical explanation is that the juror is looking for spiritual guidance – perhaps he has read the law and thinks that the convicted deserves the death penalty, but the juror cannot justify such a sentence when his religion is so expressly against murder. Alternatively, he may have read the law and come to the conclusion that the convicted should not die, but the juror retains qualms about refusing the death penalty because of concerns for the victims’ families.⁸¹

⁷⁸ U.S. CONST. amend. VI; *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968); see *Robinson v. Polk*, 438 F.3d 350, 361 (4th Cir. 2006).

⁷⁹ *Witherspoon*, 391 U.S. at 522 (emphasis added).

⁸⁰ See *id.* at 522 n.21; *Fields*, 503 F.3d at 782; *Jones*, 706 F. Supp. at 1558, 1559.

⁸¹ All the same, the solution to this problem does not lie in the why: for even if it were possible to ascertain why a juror consults a religious text during sentencing deliberations, as discussed previously, attempting to learn from the juror exactly what his thought process was when he consulted the Bible would be in direct contravention of the Federal Rules of Evidence. See FED. R. EVID. 606(b).

The judicial system safeguards a defendant's rights through the voir dire process and peremptory challenges.⁸² Under federal law, there are five reasons for mandatory juror disqualification during voir dire: the juror is not a U.S. citizen who is at least eighteen years old and has resided for at least one year in the district in which he is called to jury service; the juror lacks a certain degree of English literacy; the juror cannot speak English; the juror is physically or mentally incapable of serving on a jury; or the juror has been charged with or convicted of a crime for which imprisonment of at least one year is permissible.⁸³ This law clearly not provide for mandatory juror disqualification based on personal beliefs.⁸⁴

In *Morgan v. Illinois*, the Supreme Court stated its standard test for dismissal of a juror due to his or her views as “whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his intentions and his oath.’”⁸⁵ As an example, the Court refers to a person who stated during voir dire that he would vote to impose the death penalty if a guilty verdict were found regardless of possibly mitigating or aggravating factors.⁸⁶ Similar to the juror disqualification statute,⁸⁷ notably absent from this standard is the idea that a juror should be dismissed because of the fear that his personal views will inform the decision of the jury. This is consistent with Supreme Court precedent, as the Court has clearly

⁸² See *Batson v. Kentucky*, 476 U.S. 79, 91 (1986); *Fields v. Brown*, 503 F.3d 755, 772 (9th Cir. 2007); *Robinson v. Polk*, 438 F.3d 350, 362-63 (4th Cir. 2006).

⁸³ 28 U.S.C. § 1865(b) (2006).

⁸⁴ Indeed, such a law would be unconstitutional as violative of the First Amendment unless it could pass strict scrutiny. Cf. *infra*, Section III(b): Prohibiting Jurors From Consulting the Bible During Sentencing Deliberations Infringes on the Jurors’ Free Exercise Rights by Compelling Jurors to Make a Moral Decision Without Biblical Guidance; *Employment Div. Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (noting that strict scrutiny is the appropriate test where a law actively targets a certain religion). There is little likelihood that the government possesses the requisite compelling interest, however, in enforcing such a law because religious affiliation is unrelated to a person’s ability to serve on a jury; therefore, the law would not be constitutional. Cf. *Batson v. Kentucky*, 476 U.S. 79, 88 (1986) (noting that juror disqualification based on race is unconstitutional because race bears no relation to a person’s qualifications for jury service).

⁸⁵ 504 U.S. 719, 728 (1992) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). Cf. *Fields v. Brown*, 503 F.3d 755, 779 (9th Cir. 2007) (noting that a juror may consult his previously learned knowledge).

⁸⁶ See *Morgan*, 504 U.S. at 729.

⁸⁷ See 28 U.S.C. § 1865(b) (2006).

and unequivocally stated that a juror is expected to take into account his past experiences and beliefs in deciding a case.⁸⁸

The voir dire process provides some relief to the problem of a juror relying heavily on his beliefs.⁸⁹ The purpose of voir dire is straightforward: attorneys ask carefully constructed questions to uncover bias, thereby making it more likely than not that the final jury as impaneled is fair and impartial, and thus does not violate the Sixth Amendment.⁹⁰ Through the use of peremptory challenges, both the prosecution and defense can strike jurors for almost any reason or for no reason at all.⁹¹ Peremptory challenges are not mandated by the Constitution, but they are deeply entrenched as one means to secure the defendant's Sixth Amendment right to a fair and impartial jury.⁹² During voir dire, each attorney gets a certain number of peremptory strikes in which the attorney can dismiss potential jurors.⁹³

There are a few limits on the use of peremptory strikes. One of those limits, created by the Supreme Court in *Batson v. Kentucky*, is that peremptory strikes used to discriminate based on race are unconstitutional.⁹⁴ If either party systematically strikes too many jurors on a seemingly racial basis (for example if the party strikes all African American jurors in the voir dire panel), the opposing party can bring what is now known as a *Batson* challenge, requesting that the party reveal his reasons for striking the jurors in question.⁹⁵ The equal protection right for jurors that was created by *Batson* means that jurors may not be selected for or dismissed from

⁸⁸ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) ("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." (quoting *Beck v. Alabama*, 447 U.S. 625, 642 (1980))).

⁸⁹ See *Fields v. Brown*, 503 F.3d 755, 772 (9th Cir. 2007).

⁹⁰ See *id.* at 773 n.10.

⁹¹ *J.E.B.*, 511 U.S. at 162 (Scalia, J., dissenting) (citing *Lamb v. State*, 36 Wis. 424, 426 (1874)).

⁹² *Batson v. Kentucky*, 476 U.S. 79, 91 (1986).

⁹³ See, e.g., *J.E.B.*, 511 U.S. at 147 (O'Connor, J., concurring) (quoting *Holland v. Illinois*, 493 U.S. 474, 484 (1990)).

⁹⁴ *Batson*, 476 U.S. at 86-87.

⁹⁵ See *J.E.B.*, 511 U.S. at 128; *Batson*, 476 U.S. at 79.

jury service for reasons that are marked by racial prejudice, and grants a defendant the right to have such a jury determine his verdict.⁹⁶ In *J.E.B. v. Alabama ex rel. T.B.*, the Court expanded its *Batson* rule, holding that jurors could not be dismissed from jury service based on their gender because to do so would entail impermissible state-sponsored prejudice based on what may prove to be inaccurate stereotypes.⁹⁷ Justice Blackmun wrote for the Court in *J.E.B.*:

All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is practically a brand upon them, affixed by the law, an assertion of their inferiority.⁹⁸

While the same concerns would animate a decision to strike a juror due to his or her religious affiliation without regard to individual religious beliefs, as doing so may rest on presumptions about that juror's religious affiliation that may or may not be true, this concern does not seem to foreclose dismissal of a juror based on her belief is that the death penalty is immoral.⁹⁹ Though members of the Court have posited in *dicta* that similar strikes based on religious affiliation could also be open to challenge, the Supreme Court has never officially held that religious affiliation is an impermissible basis for striking a juror.¹⁰⁰

⁹⁶*Batson*, 476 U.S. at 86-87.

⁹⁷ See *J.E.B.*, 511 U.S. at 130-31.

⁹⁸ *Id.* at 141-42.

⁹⁹ See *id.*; cf. *Battle v. Delo*, 19 F.3d 1547, 1564 (8th Cir. 1994) (“[D]ischarging a potential juror for his religious or moral beliefs violates a defendant’s constitutional rights.” (quoting *Davis v. Georgia*, 429 U.S. 122, 122-23 (1976))). This, however, refers to the defendant’s rights, whereas *J.E.B.* and *Batson* are cited here for the rights of the juror.

¹⁰⁰ In his dissent from *J.E.B.*, Justice Scalia posited that the *Batson* challenge may have been expanded to encompass religion: “Even if the line of our later cases guaranteed by today’s decision limits the theoretically boundless *Batson* principle to race, sex, and perhaps other classifications subject to heightened scrutiny (*which presumably would include religious belief*), much damage has been done.” *Id.* at 161 (1994) (Scalia, J., dissenting) (emphasis added). While this dissent does not hold precedential value, it does indicate that at least one member of the Court would likely be open to hearing an argument for expanding *Batson* to encompass religious strikes, as well. One case as to which the Court denied certiorari involved the question of jurors being dismissed due to religion. See Amy B. Gendleman, *The Equal Protection Clause, The Free Exercise Clause and Religion-Based Peremptory Challenges*, 63 U. CHI. L. REV. 1639, 1640 (1996) (citing *State v. Davis*, 504 N.W.2d 767, 770-71 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994)). Justice Thomas dissented from this denial, noting that any classification that gives rise to heightened scrutiny in an equal protection analysis should be included under *Batson*. See *id.*

The Court, however, has noted its concern with dismissal due to religious affiliation.¹⁰¹ In explaining just what it means to create an “impartial jury drawn from a cross-section of the community,” the Court stated:

This does not mean, of course, that every jury must contain representatives of all the economic, social, *religious*, racial political and geographical groups of the community . . . But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.¹⁰²

The Court’s explicit mention of religion with other protected classes indicates that any signal suggesting that a juror was dismissed for religious reasons should be considered seriously.¹⁰³

This makes sense – just because a juror identifies herself as a member of a certain religion does not necessarily mean that she unwaveringly believes in every tenet of that religion. Indeed, there are many Catholics, for example, who may disagree with the Church’s official position on birth control or abortion, yet still self-identify as Catholic. Furthermore, an attorney is permitted during voir dire to inquire into the potential juror’s personal views that may influence his decision making capacity.¹⁰⁴ An attorney is free to strike a potential juror if the potential juror holds *any* views signaling that his verdict may not be in line with the evidence presented at trial and the law of the state, whether or not those views are based in religion.¹⁰⁵

In jurisdictions where the Bible is considered to be an outside influence,¹⁰⁶ there is an additional concern that the sentence the jurors impose will be based on biblical canon rather than

¹⁰¹ *J.E.B.*, 511 U.S. at 146 n.19 (emphasis added).

¹⁰² *J.E.B.*, 511 U.S. at 146 n.19.

¹⁰³ *See id.*

¹⁰⁴ *See* *Fields v. Brown*, 503 F.3d 753, 773 n.10 (9th Cir. 2007); *Robinson v. Polk*, 438 F.3d 350, 364 (4th Cir. 2006). For example, it is plainly permissible for an attorney to inquire of a potential juror on voir dire whether or not he adheres to a religious objection to imposing the death penalty. If the juror answers that he does object to the death penalty on religious grounds and those beliefs would prevent him from voting for or against the death penalty regardless of the facts of his case, the juror may properly be dismissed.

¹⁰⁵ *See Robinson*, 438 F.3d at 364; *Battle v. Delo*, 19 F.3d 1547, 1564 (8th Cir. 1984) (noting that a juror who says he will vote against the death penalty regardless of the evidence presented at trial should be dismissed).

¹⁰⁶ *See Oliver v. Quarterman*, 541 F.3d 329, 336 (5th Cir. 2008) (noting that the First, Eleventh, and Sixth Circuits view the Bible as extraneous evidence). The majority also notes that the Fourth Circuit does not consider the Bible as an external influence, while the “Second, Third, Seventh, Eighth, Tenth, and D.C. Circuits” have yet to consider

the law of the state.¹⁰⁷ Even in a jurisdiction where the Bible is referred to as possessing evidentiary properties, however, the jury should be permitted to consult the Bible for spiritual guidance during sentencing deliberations because, arguably, there is a low risk of prejudice associated with such a use of the Bible – the Bible contains passages that speak both in favor of capital punishment and against it.¹⁰⁸ As such, a juror who consults a Bible in its entirety¹⁰⁹ has at his disposal passages that are both for and against the death penalty.¹¹⁰ Those passages that the juror elects to consult are likely those that coincide with his previously held beliefs, thus reducing the likelihood that the passages influenced the juror’s vote any more than the juror’s individual views would have.

More importantly, a juror’s decision on whether or not to impose the death penalty will necessarily be informed by his or her moral views on capital punishment.¹¹¹ This is not to say that a juror will supplant the evidence presented at trial with his or her views. A juror who believes the death penalty is morally objectionable may still vote to impose the death penalty, but she may be more skeptical as to the credibility of the evidence presented, or may use a different quantification for the appropriate standard of proof than she otherwise would have used. That in

the issue. *Id.* at 338, 338 n.11. The Ninth Circuit in *Fields v. Brown* declined to decide whether or not the Bible is an improper influence because the court determined that the Bible had not affected the jury’s verdict in any substantial way. *Id.* at 338.

¹⁰⁷ See *Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N. D. Ga. 1989).

¹⁰⁸ But see *Fields*, 503 F.3d at 778 (noting that the district court had determined the Bible to potentially be “highly prejudicial”). One representative passage in favor of the death penalty is “Whoever sheds the blood of man, by man shall his blood be shed.” Sporn, *supra* note 8, at 815 (quoting *Genesis* 9:6). Representative passages against the death penalty include many allegories found in the New Testament, including one story of Jesus Christ condemning the execution of a woman for adultery because the executioners lack moral authority for killing. David F. Greenberg and Valerie West, *Siting the Death Penalty Internationally*, 33 LAW & SOC. INQUIRY 295, 304 (2008) (citing *John* 8:3-11).

¹⁰⁹ The Bible in its entirety is what is at issue here because courts have already held that it is permissible for a juror to consult in her head Bible passages that she has memorized. See *Robinson*, 438 F.3d at 363-64.

¹¹⁰ See Greenberg, *supra* note 108.

¹¹¹ Cf. *Witherspoon v. Illinois*, 391 U.S. 510, 516 n.8, 522 n.20 (1968).

itself is not objectionable, as the Court has already determined that jurors should not come into deliberations as a *tabula rasa*.¹¹²

* * *

Courts are divided as to whether or not the Bible is considered an impermissible outside influence on sentencing deliberations, and the Supreme Court should offer guidance in this area. If the Bible is not an outside influence, denying jurors access to the Bible during deliberations potentially violates the jurors' Free Exercise rights.

Section III: Courts Potentially Infringe on Jurors' First Amendment Rights by Their Desire to Protect the Rights of Capital Defendants

That the rights of jurors may be overlooked in favor of protecting the rights of a capital defendant is not unreasonable – extraordinary precautions must be taken to protect a capital defendant whose life is at stake.¹¹³ However, the rights of the juror cannot be ignored – as American citizens, jurors have rights that cannot be overlooked simply because they have been selected to serve on a capital sentencing jury. Indeed, cases involving peremptory challenges, while protective of defendants' rights,¹¹⁴ have acknowledged at least one fundamental right of jurors: the right to be selected to serve on a jury in a voir dire process that is free from discrimination.¹¹⁵ Subsection (a) will briefly discuss the division amongst the courts as to jurors' use of the Bible during sentencing deliberations. Subsection (b) will specifically discuss how courts potentially infringe on jurors' free exercise rights when they prevent jurors from consulting the Bible.

¹¹² See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (quoting *Beck v. Alabama*, 447 U.S. 625, 642 (1980)).

¹¹³ See *Fields v. Brown*, 503 F.3d 755, 780 (9th Cir. 2007).

¹¹⁴ See *supra* Section II(b): Juror Consideration of an Outside Influence Violates a Defendant's Sixth Amendment Rights, for a thorough explication of the jury selection process, as that is one of the primary processes to guarantee a fair trial to a criminal defendant.

¹¹⁵ See, e.g., *id.*

(a) Courts are Divided on Jurors' Bible Use During Capital Sentencing Deliberations

Jurors' rights are sometimes considered subordinate to the rights of a capital defendant.¹¹⁶ While jurors are simply performing their civic duties, a capital defendant literally has his life on the line. In her concurring opinion to *J.E.B. v. Alabama ex rel. T.B.*, a case in which the Supreme Court considered gender discrimination in jury selection, Justice O'Connor discussed the possibility of limiting a defendant's use of peremptory challenges as "'a serious misordering of our priorities,' for it means 'we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant . . . who faces . . . death.'"¹¹⁷ Justice O'Connor's words signal the extreme care that must be taken to protect a defendant's rights.

It is also important to realize, however, that jurors are not agents of the state. In *Fields v. Brown*, a juror, while he was at home one night, compiled a list of passages from the Bible that reflected the Bible's position on the death penalty.¹¹⁸ The juror listed the pros and cons of capital punishment and brought the list to deliberations with him the following day for discussion with his fellow jurors.¹¹⁹ The Ninth Circuit, while noting that it was unnecessary to decide whether juror misconduct occurred, found that the list that the juror compiled is more akin to general knowledge: "Both the Biblical verses and the other concepts contained in the notes are notions of general currency that inform the moral judgment that capital-case jurors are called upon to make."¹²⁰ The Ninth Circuit also emphasized the fact that this juror simply gathered in one coherent document ideas that are within the general knowledge of many, thereby bolstering

¹¹⁶ See 511 U.S. 127, 130, 150 (1994) (O'Connor, J., concurring) (quoting *Georgia v. McCollum*, 505 U.S. 42, 61-62 (1992) (Thomas, J., concurring in judgment)).

¹¹⁷ *Id.*

¹¹⁸ *Fields*, 503 F.3d at 777.

¹¹⁹ *Id.*

¹²⁰ See *id.* at 780.

the court's opinion that the Bible verses are more appropriately considered general knowledge than an improper outside influence.¹²¹ In discussing an acceptable role for the Bible in a trial, the court noted that a prosecutor would not be able to make references to the Bible in his opening or closing statements due to his position as an agent of the state.¹²² The court explained that a juror is permitted to make statements that, if said by the prosecutor, would otherwise be impermissible due to the prejudice or bias to which those statements may give rise.¹²³ The court also put extreme weight and faith on the presumption that jurors will follow the court's instructions to base their decision only on the evidence that was admitted in court.¹²⁴

In *Atkins v. Moore*, the Fourth Circuit declined to decide the issue of whether or not a juror's reading of the Bible was permissible because at the time of the defendant's conviction, there was no established constitutional rule that would have given him relief.¹²⁵ In *Atkins*, one of the jurors researched Bible passages that she recalled from her religious training in order to use those passages to sway two jurors who did not want to condemn the defendant to death because they held religious convictions against the death penalty.¹²⁶ Though in *Atkins* the jurors used Bible passages to convince their peers that their religious convictions did not foreclose a sentence of death, it is equally as plausible to imagine a scenario where jurors use the Bible to convince their peers of the *impropriety* of a death sentence in a given case.¹²⁷

¹²¹ *See id.*

¹²² *Id.* at 781. *See also* *Oliver v. Quarterman*, 541 F.3d 329, 338 n.10 (5th Cir. 2008) (quoting *Romine v. Head*, 253 F.3d 1349, 1368 (11th Cir. 2001) (“[A] prosecutor misleads a capital sentencing jury when he quotes scripture as higher authority for the proposition that death should be mandatory for anyone who murders his parents.”) (alteration in original)).

¹²³ *See Fields*, 503 F.3d at 781; *see also Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989) (noting that religious appeals introduced into sentencing by the attorneys are not allowed, but leaving open the possibility that jurors may individually consult Bibles for spiritual guidance).

¹²⁴ *Fields*, 503 F.3d at 781-82.

¹²⁵ *Atkins v. Moore*, No. 97-17, 1998 WL 93409, at *8 (4th Cir. Mar. 5, 1998).

¹²⁶ *Id.*

¹²⁷ *See generally Sporn, supra* note 8, for a discussion of the Bible passages regarding the death penalty.

The propriety of a death sentence should not depend on religious convictions – a sentence as final as death should be imposed only if the law of the state says it is an appropriate sentence considering the crime along with other mitigating or aggravating factors.¹²⁸ Permitting jurors to consult the Bible not as a source of law, but as a way to reconcile the decision the juror has made with his own spiritual beliefs does not undermine this fact.¹²⁹ Indeed, in *Jones v. Kemp*, the district court noted that:

The court in no way means to suggest that jurors cannot rely on their personal faiths and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen. There is thus no issue raised here as to possession, even in the jury room, of personal Bibles, perhaps even consulted for personal . . . inspiration or spiritual guidance.¹³⁰

Though the court in *Jones* found a constitutional violation where the Bible was consulted, this quote indicates that the violation was thus due to the fact that the Bible was consulted by the jurors as a group and not for individual spiritual guidance, likely because group consultation indicates that the Bible may have been consulted as evidence.¹³¹

Eight years after *Atkins*, the Fourth Circuit engaged in the same debate over the meaning of the Bible in sentencing deliberations in *Robinson v. Polk*.¹³² In *Robinson*, the majority noted that “*precisely because* the Bible occupies a unique place in the moral lives of those who believe in it, its teachings cannot blithely be lumped together with a private communication, contact, or

¹²⁸ Cf. *State v. Williams*, 832 N.E.2d 783, 789 (Ohio Ct. App. 2005) (“A search for the command of extrajudicial ‘law’ from any source other than the trial judge, no matter how well intentioned, is not permitted. The use by deliberating jurors of an extrajudicial code (not already embodied in their own characters) cannot be reconciled with the Eighth Amendment’s requirement that any decision to impose death must be the result of discretion which is carefully and narrowly channeled and circumscribed by the secular law of the jurisdiction.”) (quoting *Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989)).

¹²⁹ See *Jones*, 706 F. Supp. at 1560 (hypothesizing that personal consultation of the Bible may be permissible though group consultation is not).

¹³⁰ *Id.*

¹³¹ See *id.* (noting that “a situation in which a jury . . . could reach a conclusion by consulting sources other than the legal charge of the court and evidence actually received by the court” is unacceptable, and finding group consultation of the Bible to be unconstitutional).

¹³² 438 F.3d 350, 352 (4th Cir. 2006).

tampering with a juror without clear guidance from the Supreme Court.”¹³³ According to the majority, the Bible should be elevated to a higher place outside of the realm of an impermissible communication because of the spiritual guidance it provides to adherents.¹³⁴ The dissenting judge, however, explained that the majority’s characterization of the Bible as something other than an outside influence on the jury would be insulting to those who believe in the Bible, and that the majority’s apparent position that a juror who believed in the Bible could be more influenced by an external communication than by a “divine command to condemn a defendant to death” seems to discount the believer’s faith in the Bible.¹³⁵

Two possible ways that jurors can use the Bible are as a source of law in addition to the law of the state or as a moral reconciliation of the juror’s beliefs with the sentence he has voted to impose after the law of the state has already been applied.¹³⁶ Because it is impermissible to inquire into a juror’s internal decision making processes and there is a presumption in favor of the impartiality of a juror, the juror should get the benefit of the doubt that he is not using the Bible as a source of law, but rather for spiritual guidance, the same way a silent prayer may be used.¹³⁷ Such a use of the Bible is permissible because it does not seek in the Bible the appropriate punishment, but rather spiritual validation that the decision the believer thinks is the correct one will not go against her own beliefs.¹³⁸

¹³³ *Id.* at 366. Indeed, this quote even signals that the lower courts themselves would like the Supreme Court to provide guidance in this area.

¹³⁴ *See id.* (but double check this)

¹³⁵ *Robinson*, 438 F.3d at 374 (King, J., dissenting).

¹³⁶ *See Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989).

¹³⁷ *See* FED. R. EVID. 606(b); *State v. Williams*, 832 N.E.2d 783, 789 (Ohio Ct. App. 2005); 75B AM. JUR. 2d Trial § 1417 (2009). It is important to note that the *Williams* court found a distinction between silent prayer and the Bible, explicitly noting that “prayer cannot be considered an ‘extrajudicial code’; unlike certain tenets of the Bible, the prayer did not discourage a recommendation that the death penalty be imposed.” *Williams*, 832 N.E.2d at 789. This does not foreclose a finding that the Bible may be consulted for individual spiritual guidance, but only rejects its use as a source of law. *See id.*

¹³⁸ *Cf. Burch v. Corcoran*, 273 F.3d 577, 590 (4th Cir. 2001) (noting that with no evidence that the sentence was based on religious law as opposed to the state law, the jurors’ consultation of the Bible did not amount to misconduct and thus was permissible); Michael Ariens, *Evidence of Religion and the Religion of Evidence*, 40 BUFF.

(b) *Prohibiting Jurors From Consulting the Bible for Spiritual Guidance During Capital Sentencing Deliberations Infringes on the Jurors’ Free Exercise Rights by Compelling Jurors to Make a Moral Decision Without Biblical Guidance*

The First Amendment prohibits Congress from enacting any law “prohibiting the free exercise” of religion.¹³⁹ The Supreme Court has articulated a rather literal explication of the Free Exercise Clause: “Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities.”¹⁴⁰

The Supreme Court’s 1990 decision in *Employment Division Department of Human Resources of Oregon v. Smith* radically changed Free Exercise jurisprudence.¹⁴¹ Prior to *Smith*, if the “government . . . placed a substantial burden on the observation of a central religious belief or practice,” the Court looked for a compelling interest to justify imposing that burden.¹⁴² Justice Douglas was doubtful that the government could ever have a compelling enough interest to justify imposing any type of burden on the free exercise of religion, rejecting this strict scrutiny test under the belief that even a compelling interest would not be enough to justify a government-imposed burden on the exercise of one’s religion.¹⁴³ There has been, therefore, a

L. REV. 65, 99-100 (1992) (cautioning that prohibiting jurors from relying on prayer during deliberations may impermissibly create a religious test for serving on a jury because jurors who pray will not be allowed to serve).

¹³⁹ U.S. CONST. amend. I. The First Amendment has been incorporated into the Due Process Clause of the Fourteenth Amendment and thus applies to the states. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940). As a result, the same analysis would apply to state courts as well.

¹⁴⁰ *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

¹⁴¹ See 494 U.S. 872, 891 (1990) (O’Connor, J., concurring in judgment).

¹⁴² *Hernandez v. Graham*, 490 U.S. 680, 699 (1989). This is known as the *Sherbert* balancing test, after the case in which it was articulated, *Sherbert v. Verner*.

¹⁴³ *United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 15 (1974) (Douglas, J., dissenting) (“I have not bowed to the view of the majority that ‘some compelling state interest’ will warrant an infringement of the Free Exercise Clause.”).

notion that religion is so important that it may not be infringed at all – religious exercise may be protected “even though that religious exercise is obnoxious to the majority.”¹⁴⁴

It is well established that religious conduct can be regulated by the government, despite some disagreement amongst the Justices as to exactly which test should apply to determine whether or not there is a violation of the Free Exercise Clause. The Supreme Court has specified that free exercise may be regulated where allowing a particular practice “pose[s] some substantial threat to public safety, peace, or order.”¹⁴⁵ Additionally, government regulations involving such issues as, *inter alia*, tax exemptions that possibly infringe on the right to free exercise¹⁴⁶ and states’ refusals to fund abortion¹⁴⁷ have been upheld as exercises of the state’s police power.

The Supreme Court precedent in regards to the Free Exercise Clause has most recently applied strict scrutiny to government regulations of religious conduct where the government has prevented an individual from practicing her religious beliefs only where the government action actively targeted religion.¹⁴⁸ In *Smith*, the Court considered a law criminalizing use of peyote, a Schedule I drug.¹⁴⁹ Two members of the Native American religion for whom consumption of the drug is a religious sacrament had been fired for their use of the drug, and were prevented from receiving unemployment benefits because they were terminated due to “misconduct.”¹⁵⁰ Justice Scalia writing for the majority found that the Free Exercise Clause is only violated where the government actively targets religious practice, thereby doing away with the previously used

¹⁴⁴ *Id.*

¹⁴⁵ *Sherbert*, 374 U.S. at 403.

¹⁴⁶ *See, e.g., Hernandez v. Graham*, 490 U.S. 680, 699 (1989) (finding that the government’s interest in maintaining an efficient tax system is sufficient to justify not granting tax exemptions based on religion).

¹⁴⁷ *See Maher v. Roe*, 432 U.S. 464, (1977) (holding that states are not required to fund abortion for women although the state funds pregnancy because it is rational for the state to allocate funds to advance its interest in life).

¹⁴⁸ *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Employment Div. Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 886 n.3 (1990).

¹⁴⁹ *Smith*, 494 U.S. at 874.

¹⁵⁰ *See id.*

balancing test requiring a compelling governmental interest for an incidental regulation of religious practice in contexts other than unemployment compensation cases.¹⁵¹ According to Justice Scalia, the Free Exercise Clause protects an individual's "right to believe and profess" the religion of that individual's choosing, thus leaving the government free to regulate religious conduct.¹⁵² However, where a generally applicable and neutral law is in conflict with a religious practice, the law prevails.¹⁵³

In *Smith*, the Court found no violation of the Free Exercise Clause because the law at issue was neutral and generally applicable, and did not implicate any other fundamental rights.¹⁵⁴ Where the alleged violation of the Free Exercise Clause is intertwined with a violation of another fundamental right, such as the right to raise one's children as one sees fit or the right to Free Speech, the Free Exercise violation will be considered under the relevant standard of review for the other violation.¹⁵⁵ *Locke v. Davey* clarified that where no other fundamental rights are implicated, rational basis review will apply to a neutral law of general application.¹⁵⁶ Concurring in the *Smith* judgment, Justice O'Connor noted that the compelling state interest test should apply to attempts to regulate religious conduct even when those attempts are neutral and generally applicable, but conceded that there may often be a compelling government interest where the state has seen fit to ban a certain practice across the board.¹⁵⁷

Despite the lowered standard that remained in *Smith*'s wake, the Court has found one violation of the Free Exercise Clause without an attendant violation of another fundamental right.

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court considered a law forbidding

¹⁵¹ See *id.* at 884-85.

¹⁵² *Id.* at 877.

¹⁵³ *Id.* at 878-79.

¹⁵⁴ *Id.* at 883.

¹⁵⁵ See *id.* at 883.

¹⁵⁶ See 540 U.S. 712, 721 n.3 (2004) (applying rational basis review to religious discrimination claims under the Equal Protection Clause after it has been determined that there is no violation of the Free Exercise Clause).

¹⁵⁷ See *Smith*, 494 U.S. at 894, 899 (O'Connor, J., concurring in judgment).

animal sacrifice for worship purposes.¹⁵⁸ Justice Kennedy, writing for the majority, noted that a prohibition on conduct that is performed for religious reasons implicates the Free Exercise Clause and thus cannot be considered neutral.¹⁵⁹ According to Kennedy, a law is not neutral if the law targets a religious practice solely because it is performed as religious exercise.¹⁶⁰ However, just because a law is facially neutral does not mean the Free Exercise Clause has not been violated.¹⁶¹ If the government is targeting religious practice, even subtly, a facially neutral law will be subject to strict scrutiny.¹⁶² The Court in *Lukumi* found that, although the law was facially neutral, there existed substantial support in the record for a finding that the law was enacted to target the religion, including statements that citizens of the city were concerned of the religion's effect on public morality.¹⁶³

Whether or not prohibiting jurors from consulting the Bible would be generally applicable and neutral depends on the level at which the prohibition is considered.¹⁶⁴ If the religious text is considered an outside influence and the prohibition is considered from the vantage point of banning consultation of all outside influences, the *Smith* analysis should apply, and no infringement should be found. If the ban is considered just a ban on consulting religious texts, but not on other manners of reconciling the sentence with one's own personal beliefs, it may not be considered neutral and generally applicable.

Merely allowing a juror to consult the Bible is fundamentally different from the law at issue in *Smith*. *Smith* explicitly spoke to neutral regulatory laws that have been enacted for the

¹⁵⁸ 508 U.S. 520, 527 (1993).

¹⁵⁹ *Id.* at 533.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 534.

¹⁶² *Id.*

¹⁶³ *Id.* at 534-35.

¹⁶⁴ *Cf.* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (giving rise to the idea that a different level of analysis may apply depending on how narrowly a right is considered) (not joined by the majority).

social good of the citizens of the state.¹⁶⁵ *Smith* set the bar much lower than the “compelling government interest” previously required to justify a violation of the Free Exercise Clause. If a prohibition on consulting the Bible is premised first and foremost on its classification as an outside influence, the law will be facially neutral and the *Smith* test will apply.¹⁶⁶ In that case, it is likely that a prohibition on juror consultation of the Bible will be upheld because it is rationally related to a legitimate government interest in protecting the Sixth Amendment rights of capital defendants.¹⁶⁷

If a ruling that the Bible is an outside influence is based on religion, strict scrutiny is appropriate for this inquiry.¹⁶⁸ Alternatively, the Supreme Court may decide that strict scrutiny applies under Justice O’Connor’s view in *Smith*: the Court may decide to apply the compelling interest test to a prohibition on jurors’ consulting the Bible regardless of whether it is determined to be neutral and generally applicable. In such a case, it is unlikely that the prohibition will be upheld. To survive strict scrutiny, the government must have a compelling interest in what it regulates and the law must be narrowly tailored to achieving that interest.¹⁶⁹ A blanket prohibition on consulting the Bible during sentencing arguably targets religion because such a ban would prevent jurors from fully using their religious beliefs to inform the sentencing process while other past knowledge and ways of acquiring beliefs, such as advanced schooling,¹⁷⁰ would be permissible. The government likely does have a compelling interest in ensuring that capital defendants’ guilt and sentence are determined based solely on the evidence presented at trial. However, prohibiting jurors from consulting Bibles is not narrowly tailored to this interest.

¹⁶⁵ See *Employment Div. Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 885 (1990). (?)

¹⁶⁶ Cf. *Lukumi*, 508 U.S. at 533-34 (defining the lack of facial neutrality as reference to a religious practice with no non-religious meaning).

¹⁶⁷ See *Locke v. Davey*, 540 U.S. 712, 721 n.3 (2004) (applying rational basis review to a neutral law of general applicability).

¹⁶⁸ See *Lukumi*, 508 U.S. at 546.

¹⁶⁹ See *id.*

¹⁷⁰ See *Fields v. Brown*, 503 F.3d 755, 779 (9th Cir. 2007).

Prohibiting the jury from consulting spiritual guidance does not further the government's interests in protecting the defendant's rights - it does not create an impartial and fair jury, as is demonstrated by the fact that jurors are permitted to rely on their own belief systems and life experiences in deciding a verdict and sentence.¹⁷¹ As such, the prohibition would be vastly under-inclusive, as judges have little control over jurors' use of their own knowledge and experiences, which may create even more prejudice against the defendant. The defendant is still able to confront the evidence used against him because, as discussed above, the Bible cannot constitute evidence as it does not "make a fact of consequence more or less likely to be true."¹⁷²

* * *

The judicial prohibition on jurors' consulting the Bible does carry the potential to violate jurors' free exercise right. It is unclear whether rational basis review or strict scrutiny would apply to a prohibition on consulting the Bible for spiritual guidance. It is necessary that the Supreme Court settle this question once and for all.

Section IV: The Voir Dire Process Protects the Rights of Defendants, Negating the Need for the Court to Take Further Steps Which Infringe on the Jurors' Rights

As voir dire is a key way of safeguarding the rights of a criminal defendant,¹⁷³ if an attorney may not strike a juror due to her religious beliefs, that may be due to the extraordinary protection afforded religion by the First Amendment. Alternatively, if peremptory strikes resulting from a dislike of the juror's religious affiliations are permissible, it is the attorney's duty to inquire into the juror's religious affiliations during voir dire. If the attorney does not do

¹⁷¹ See *id.* at 780 (quoting *Hard v. Burlington N.R.R. Co.*, 870 F.2d 1454, 1462 (9th Cir. 1989)).

¹⁷² See *supra* Section II(a): What is an Outside Influence?

¹⁷³ See *supra* Section II(c): The Sixth Amendment Does Not Protect a Defendant From a Jury Free of Religious Positions on Capital Punishment.

so, it can be assumed that he is waiving any disagreement he may have with the juror's use of those beliefs in formulating a decision.

Jurors cannot be presumed to have given up their constitutional rights by virtue of serving on a jury.¹⁷⁴ The Court has explicitly said that it does not expect jurors to come into deliberations with a completely clean slate¹⁷⁵; indeed, part of the benefit of being tried by a jury of one's peers is the variety of life experiences that come into play to influence a verdict. The fact that the defendant's rights are so adequately protected during voir dire by intense questioning of the potential juror's fitness for jury service is all the more reason for courts to refrain from imposing unnecessary restraints on jurors' right to free exercise of their religions. Thus jurors should be permitted to consult the Bible for spiritual guidance during sentencing.

To protect the rights of all of the players involved, one feasible solution is to encourage the attorneys to question potential capital jurors on voir dire as to their positions on the death penalty, explicitly attempting to elicit whether or not they would be able to follow the law of the state in assessing the propriety of a death sentence. Additionally, judges could be required to add a jury instruction to capital cases, acknowledging that the state is granting the jurors a power that may be difficult to exercise, and articulate explicitly that if there is any chance that the sentence might reflect the jurors' personal predilections rather than the law of the state, that juror may request and be granted removal from the jury without penalty.

Indeed, the Ninth Circuit has recognized a juror's right, in accord with the Free Exercise Clause, to request and be granted removal from a jury in the event that she realizes that returning a verdict one way or the other will go against her religious convictions.¹⁷⁶ This allowance coordinates the juror's First Amendment rights with the defendant's Sixth Amendment rights: a

¹⁷⁴ Cf. *Batson v. Kentucky*, 476 U.S. 79, 86-87 (1986).

¹⁷⁵ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring).

¹⁷⁶ *United States v. Decoud*, 456 F.3d 996, 1017 (9th Cir. 2006).

juror will not be forced to return a verdict that may go against her religious convictions, and a defendant need not risk that the juror returned the verdict based not on the evidence presented at trial, but *solely* on her religious convictions.

In any event, the Supreme Court should grant the lower courts' plea for guidance in this arena: there is sufficient split in the way courts are ruling on the issue of jurors consulting Bibles that the Court should articulate the proper way to view the Bible's use.

Conclusion: The Supreme Court Should Offer Guidance as to Capital Jurors' Consulting the Bible for Spiritual Guidance

There is something perverse in condemning a defendant for killing, and yet expecting his jury to order him to death with a clear conscience. Indeed, the Supreme Court has acknowledged the awesome power granted to a capital sentencing jury: in his discussion of dismissing a juror due to her moral qualms over imposing the death penalty, Justice Stewart quoted from a Mississippi case: "Few men would [like a man to be hung]. Every right-thinking man would regard it as painful to pronounce a verdict of death upon his fellow man."¹⁷⁷ Whether a juror is Christian, Jewish, Buddhist, Muslim, Atheist, Agnostic, or identifies with any other religious or areligious tradition, ordering that a person be put to death is a profound experience that necessarily draws on the juror's spiritual beliefs.¹⁷⁸ For that reason, the Supreme Court would be wise to offer guidance as to this contentious area and settle once and for all whether it is permissible for capital jurors to consult Bibles for spiritual guidance only during their sentencing deliberations.

¹⁷⁷ *Witherspoon v. Illinois*, 391 U.S. 510, 515 n.8 (1968) (quoting *Smith v. State*, 55 Miss. 410, 413-14 (1877)).

¹⁷⁸ *Cf.* Terrence T. Eglund, *Prejudiced by the Presence of God: Keeping Religious Material Out of Death Penalty Deliberations*, 16 CAP. DEF. J. 337, 340-41 (2004) for a discussion of various religion's positions on the death penalty.