IN THE

THE SUPREME COURT OF THE UNITED STATES

FEDERICK MACELROY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

- I. Does the psychotherapist-patient privilege apply to threats of serious physical and economic harm made by a patient against a co-worker during an individual therapy session, a group therapy session and a break in a therapy session when the patient was informed by the psychotherapist of her legal and ethical to warn the target of the threat or law enforcement of any threats and when during the group sessions and break in a group session third parties were present?
- II. Does alleged reference to a biblical passage during jury deliberations after conviction of wire and securities fraud warrant grounds for an evidentiary hearing under one of the narrow exceptions to Federal Rule of Evidence 606(b) when the passage, in substance, speaks of engaging in commerce in the temple of God?

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STATEMENT OF THE CASE

Petitioner, Frederick MacElroy, was convicted of two counts of wire fraud and one count of securities fraud under the United States Code. (R. at 43). He was sentenced to sixty months imprisonment. (R. at 43). On appeal, he claims that the district court improperly admitted evidence protected by the psychotherapist-patient privilege under Federal Rule of Evidence 501. (R. at 43). Further, he claims that a biblical passage read aloud to the jury during deliberations constitutes extraneous prejudicial information and warrants an evidentiary hearing pursuant to Federal Rule of Evidence 606(b). (R. at 43).

Petitioner was an Executive Vice President of Helman & Sons ("HS"), a registered investment advisor, and he served as Managing Director of Helman & Sons Capital Asset

Management ("HSCAM"), a hedge fund backed in large part by subprime mortgages. (R. at 44).

The Public Employees' Retirement Fund of the State of Boerum ("PERFSB") was the single largest investor in HSCAM. (R. at 44). On January 5, 2007, HSCAM filed a quarterly report without notifying investors of the risks the current market conditions had created for the fund.

(R. at 3). On January 12, 2007, Petitioner reassured four major investors, via conference call, that their investments were sound and that they need not worry about the current market. (R. at 3). These statements turned out to be blatant misrepresentations by the Petitioner. (R. at 3). The goal of this call was to prevent the investors from invoking acceleration clauses that would have wiped out HSCAM. (R. at 3). Had the acceleration clauses been invoked, Petitioner's income and reputation would have been ruined. (R. at 3). On January 29, 2007, HSCAM went into payment default, resulting in investor losses of some \$700 million. (R. at 3). Petitioner was then indicted on two counts of wire fraud and one count of securities fraud. (R. at 44).

Prior to trial, Petitioner filed a motion in limine to exclude testimony of his psychotherapist, Dr. Golda Morgan. (R. at 45). Dr. Morgan was prepared to testify about three statements Petitioner made concerning his assistant, Alan Kayne. (R. at 45). Petitioner's first statement was: "I will annihilate him before he can do any more damage to the company. I hope he has his affairs in order, otherwise his family will be in trouble. Or maybe not, so then they can go down with him." (R. at 45). This first statement occurred during a private session with Dr. Morgan. (R. at 45). The second statement, "I'll destroy Kayne financially if he doesn't keep his mouth shut," occurred during a group therapy session with Dr. Morgan and several other patients. (R. at 45). Finally, the third statement occurred during the same group session when Petitioner said: "Alan Kayne is going to ruin everything I worked so hard to create. I'll show him. I won't let some mother effing S.O.B. destroy my company. I've been talking to some people and I'll get rid of him once and for all." (R. at 45). This statement occurred in the presence of Dr. Morgan and another group therapy session member in the courtyard outside of Dr. Morgan's office. (R. at 13).

Before Petitioner made these statements, Dr. Morgan had fully explained that she had a legal and ethical duty to report any threats made by her patients to the person threatened or to law enforcement. (R. at 45). Two days after Petitioner made the statements, Dr. Morgan notified Mr. Kayne of Petitioner's threats. (R. at 45). Accordingly, the district court denied the motion in limine because the substance of the statements, as threats, deprived them of their confidential nature under Federal Rule of Evidence 501 and the United States Supreme Court holding in *Jaffee v. Redmond*. (R. at 46).

At trial, Alan Kayne, Dr. Morgan, and Catherine Deane, President of PERFSB, gave testimony as to events subsequent to HSCAM's collapse. (R. at 46-47). Petitioner also testified

in his own defense. (R. at 47). The jury commenced deliberations on June 19, 2007 at 11:30 a.m. (R. at 27). At 5:30 p.m. the following day, the jury sent the court a note that said: "Despite our best efforts we have not been able to reach a unanimous decision and are quite sure that we will not ever be able to agree." (R. at 28). The court told the jury that it was "highly desirable that you agree upon a verdict." (R. at 28). The jury then reached a unanimous verdict for conviction on the third day of deliberations (R. at 30).

After trial, Petitioner's attorney filed an affidavit with the district court. According to the affidavit of Cynthia Stockton, three jurors ate dinner together following the second day of deliberations. (Aff. at ¶ 6). The three jurors discussed several items that referenced the Bible. (Aff. at ¶ 7-9). The next morning, Juror #3 pulled out a sheet of paper and read the passage in question aloud. (Aff. at ¶ 14). The passage, from Matthew 21: 12-13 stated:

And Jesus went into the temple of God, and cast out all of them that sold and bought in the temple and overthrew the tables of the moneychangers, and the seats of them that sold doves, And said unto them, It is written, My house shall be called the house of prayer; but ye have made it a den of thieves. (R. at 48 n.3).

After the passage was read aloud, Juror #8 stated, "If it's good enough for Jesus, it's good enough for me. I want to change my vote to guilty." (Aff. at ¶ 17). Two other jurors then changed their votes, and Juror #6 did the same. (Aff. at ¶ 18).

Petitioner filed a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. (R. at 47). The district court declined to hold an evidentiary hearing under Federal Rule of Evidence 606(b) because the alleged influence upon the jury was an internal matter, and therefore could not be used to impeach the jury's verdict. (R. at 48). Petitioner then appealed to the United States Court of Appeals for the Fourteenth Circuit, claiming error on the district court's denial of the motion in limine and the district court's denial to grant an evidentiary hearing under 606(b). (R. at 43).

The Fourteenth Circuit affirmed the district court in a 2-1 decision. (R. at 50, 54). On the first issue, the Fourteenth Circuit held that the "psychotherapist-patient privilege does not apply to any of the three statements." (R. at 50). In the alternative, the Court "explicitly recognize[ed] a 'dangerous-patient' exception" to the privilege and that all three threats fell within the exception. (R. at 50, 51). On the second issue, the Court held that the "alleged Bible reading is strictly internal to deliberations" so there was "no cognizable Sixth Amendment violation." (R. at 54). The Court further held that "Federal Rule of Evidence 606(b) bars juror testimony on strictly internal matters" and that the "affidavit is inadmissible to impeach the verdict." (R. at 54). Petitioner sought a writ of certiorari to this Court, which was granted on October 6, 2008, on the two issues the Fourteenth Circuit decided. (R. at 60).

SUMMARY OF THE ARGUMENT

Federal Rule of Evidence 501 defers to the common law to determine the scope of privileged evidence. The Supreme Court of the United States has declared that the public has a fundamental right to all forms of evidence. Accordingly, the scopes of privileges are narrowly construed because they are in derogation of the search for the truth. This Court recognized, in *Jaffee v. Redmond*, that the psychotherapist-patient privilege is not absolute and is limited solely to confidential communications in the course of diagnosis or treatment. The implication is that the psychotherapist-patient privilege does not attach to every statement made in the course of every psychotherapist-patient relationship. Thus, Petitioner's conviction should be affirmed because Petitioner's threats made during therapy with Dr. Morgan do not meet the requirements established in *Jaffee v. Redmond*, and thus, the privilege does not apply to such threats.

Three indispensable requirements must be met for the privilege to attach: 1) the communication is confidential; 2) made between a licensed psychotherapist and her patient; and

3) made during the course of diagnosis or treatment. While there appears to be no dispute over the second requirement, none of Petitioner's three threats made during therapy with Dr. Morgan meet the other two requirements, and accordingly, are not covered by the privilege.

The Petitioner's communication was not confidential because Dr. Morgan informed Petitioner of her duty to warn law enforcement and/or the target of any serious and imminent threats he made. Dr. Morgan testified that she is required both legally and ethically to inform patients of her duty to warn and to carry out such duty when she is required. Petitioner was thoroughly notified on two occasions of Dr. Morgan's duty to warn. Nonetheless, Petitioner proceeded to make three separate threats against Mr. Kayne. Thus, Petitioner had no expectation of confidentiality in this threat and waived the psychotherapist-patient privilege.

Additionally, two of Petitioner's threats were not confidential and not covered by the psychotherapist-patient privilege because they were made in the presence of a third party. It is a fundamental principle that the confidentiality of a communication is destroyed by the presence of third parties because the third party is not under a duty to keep the information confidential.

Thus, communication made in the presence of a third party operates as a waiver of the privilege. Here, Petitioner made two of his threats in the presence of others, thus waiving the privilege and nullifying his expectation of confidentiality.

Even if the psychotherapist-patient privilege applied to Petitioner's threats made during therapy with Dr. Morgan, Petitioner's threats were properly admitted under the dangerous-patient exception to the psychotherapist-patient privilege. In *Jaffee*, this Court expressed approval of an exception to the psychotherapist-patient privilege known as the dangerous-patient exception. While there is disagreement among circuits over the validity of the dangerous-patient exception, the correct reading of *Jaffee* recognizes that the privilege is destroyed if serious harm

can only be avoided by disclosure. Here, the substance of the threats and physical manifestations of the Petitioner when he made them served as a clear indicator to Dr. Morgan that Petitioner was very serious about his intentions to harm Mr. Kayne.

As for the second issue, Federal Rule of Evidence 606(b) codifies the longstanding common law principle that a juror may not impeach her own verdict. However, in order for this principle to be reconciled with the Sixth Amendment's guarantee of an impartial jury, Rule 606(b) permits juror testimony in three narrow exceptions. The two main exceptions allow testimony when 1) extraneous prejudicial information was brought to the jury's attention or 2) an outside influence was brought to bear upon the jury. Petitioner incorrectly claims that the alleged reading of a Bible passage falls within one of these narrow exceptions.

The threshold inquiry in determining the admissibility of juror testimony regarding deliberations is whether or not the alleged influence upon the jury was internal or external. In *Remmer v. United States*, this Court laid out a rigorous standard by holding that private communication, contact, or tampering with a juror constitutes an external influence and warrants corrective action. Conversely, in *Tanner v. United States* this Court held that possible internal abnormalities in a jury will not be inquired into absent grave circumstances.

The Bible is not the kind of private communication, contact, or tampering contemplated in *Remmer* because its pervasiveness in our society has elevated it above its tangible form.

Jurors do not leave behind their life experiences when they step into the jury box, and asking them to disregard what many look to as a moral code would be an impossible task. In *Tanner*, this Court held that alleged juror intoxication during trial was merely an internal influence.

Thus, the clear implication calls for an extremely restrictive application of the 606(b) exceptions.

Additionally, allowing alleged use of the Bible to impeach a verdict would completely undermine the policy underlying Rule 606(b). In totality, 606(b) ensures the need of verdict finality and the sanctity of jury deliberations while minimally impinging upon the right to an impartial jury and a verdict based solely on the evidence adduced at trial. Accordingly, only an egregious interference with the jury warrants invocation of one of the 606(b) exceptions. Simply stated, the Bible is not the kind of egregious interference that warrants destruction of the sound policy reasons underlying the adoption of Rule 606(b).

Finally, even if the Bible could plausibly be considered an external source, the passage in question bears such little resemblance to the facts of this case that it could amount to nothing more than harmless error. The cases that have found that the Bible could be considered an external source primarily have been capital cases because of the retribution language contained in the Bible. Here, however, the passage in question is so unrelated to the Petitioner's crimes that it would require an attenuated link to conclude that the passage could reasonably influence a jury. Further, the jury's ultimate conclusion could have been caused by the district court's instruction that it was their duty to reach a verdict, or the phenomenon of crowd psychology which occurs when people in the minority change their belief in order to conform to the majority.

In conclusion, the psychotherapist-patient privilege does not apply to any of Petitioner's three threats made in therapy with Dr. Morgan. Even if the privilege does apply, the threats were properly admitted under the dangerous-patient exception to the privilege. Thus, Petitioner's threats were properly admitted at trial. Further, the Bible cannot be considered an external influence under Rule 606(b). Even if the Bible had the potential to meet the rigorous 606(b) standard, the passage in question is so unrelated to the facts of this case that it could amount to nothing more than harmless error. Thus, an evidentiary hearing on this matter is unwarranted.

ARGUMENT

I. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT PROPERLY CONCLUDED THE PSYCHOTHERAPIST-PATIENT PRIVILEGE DOES NOT APPLY TO PETITIONER'S THREATS MADE DURING THERAPY WITH DR. MORGAN BECAUSE THE THREATS DO NOT MEET THE STANDARDS FOR THE APPLICABILITY OF THE PSYCHOTHERAPIST- PATIENT PRIVILEGE UNDER JAFFEE V. REDMOND.

Federal Rule of Evidence 501 provides that "the privilege of a person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501. When interpreting privileges, this Court has found that it is a "fundamental principle that 'the public has a right to every man's evidence.' "Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)). Moreover, this Court has recognized that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974). Keeping these principles of privilege construction and interpretation in mind, when first acknowledging the existence of a psychotherapist-patient privilege in Jaffee v. Redmond, this Court recognized that the psychotherapist-patient privilege is not absolute and comes with limitations. In fact, the applicability of the psychotherapist-patient privilege is limited to "confidential communications between a licensed psychotherapist and her patient . . . under Rule 501." Jaffee v. Redmond, 518 U.S. 1, 15 (1996). Furthermore, the confidential communications must be made to the therapist "in the course of diagnosis or treatment" to be protected by the psychotherapist-patient privilege. Id. Finally, this Court noted that the applicability of the psychotherapist-patient privilege should be examined on a case by case basis. *Id.* at 18. These limitations indicate that this Court did not intend for the psychotherapist-patient privilege to attach to every statement made in the course of every psychotherapist-patient relationship. Therefore, for the reasons discussed below,

Petitioner's conviction should be affirmed because his threats made during therapy with Dr. Morgan do not meet the requirements established in *Jaffee v. Redmond* and consequently, the psychotherapist-privilege does not apply to such threats.

A. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE DOES NOT APPLY TO PETITIONER'S THREATS MADE DURING THERAPY WITH DR. MORGAN BECAUSE PETITIONER'S THREATS WERE NOT CONFIDENTIAL COMMUNICATIONS MADE DURING THE COURSE OF DIAGNOSIS OR TREATMENT.

As previously stated, the psychotherapist-patient privilege is limited to "confidential communications between a licensed psychotherapist and her patients [during] the course of diagnosis or treatment." *Id.* at 15. Therefore, the psychotherapist-patient privilege will not attach unless the communication is 1) confidential; 2) made between a licensed psychotherapist and her patient; and 3) made during the course of diagnosis or treatment. *Id.*; *see*, *e.g.*, *In Re Grand Jury Proceedings, Violette*, 183 F.3d 71, 73 (1st Cir. 1999). In this case, although Petitioner made threats during therapy with a licensed psychotherapist, none of Petitioner's three threats made to Dr. Morgan meet the other two requirements, and accordingly, are not covered by the psychotherapist-patient privilege. Therefore, the admission of Petitioner's threats was proper.

1. Petitioner's threats made during an individual therapy session and a group therapy session with Dr. Morgan were not confidential and not covered by the psychotherapist-patient privilege because Dr. Morgan informed Petitioner of her duty to warn law enforcement and/or the target of any serious and imminent threats made by Petitioner.

In analyzing the applicability of the psychotherapist-patient privilege, the therapist's duty to inform the client of the boundaries of the therapist-patient relationship is crucial. In fact, this Court acknowledged that "at the outset of their relationship, the ethical therapist must disclose to the patient 'the relevant limits on confidentiality.' " *Jaffee*, 518 U.S. at 13, n.12; *see* AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT,

Standard 501 (Dec. 1992). Defining the relevant limits of confidentiality usually involves the therapist informing the patient that she has a duty to warn law enforcement or the target of any threats made by the patient in therapy. *See Tarasoff v. Regents Univ. of Cal.*, 17 Cal.3d 425 (1976) (acknowledging that therapists have a duty to warn third parties or police of possible violence by the patient). If the patient proceeds to make a threatening statement during therapy even though the duty to warn has been expressed by the therapist, the statement is not confidential because the patient no longer has a "reasonable expectation of confidentiality." *United States v. Auster*, 517 F.3d 312, 317 (5th Cir. 2008) (quoting *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997)). The key question then becomes "whether there was a 'reasonable expectation of confidentiality' when the statement was made." *Id.* Therefore, when a patient knowingly makes statements that trigger the therapist's ethical and legal duty to warn, the patient has no expectation of confidentiality in such statements and has effectively waived the psychotherapist-patient privilege. *See also Jaffee*, 518 U.S. at 15 n.14 ("Like other testimonial privileges, the patient may of course waive the protection.").

In this case, Petitioner's threats during an individual session and group SAD session do not meet the confidentiality requirement of *Jaffee*, and thus make the psychotherapist-patient privilege inapplicable to those threats. Dr. Morgan testified that the American Psychiatric Association Principles of Medical Ethics require her to divulge confidential information under proper legal compulsion. (R. at 15). Furthermore, the law in the State of Boerum provides that Dr. Morgan has a duty to warn law enforcement or the target of any serious of imminent threats made by a patient. (R. at 15). Consequently, Dr. Morgan is required both legally and ethically to inform patients of her duty to warn and to carry out such duty when she is required.

Petitioner was notified of Dr. Morgan's duty to warn at all times during the course of therapy, thus fulfilling the requirement of the therapist to inform the patient of the limits on confidentiality. In his first individual therapy session for treatment of Petitioner's anger, anxiety and stress, Dr. Morgan explained to Petitioner that their sessions would remain confidential, but if he made any threats to anyone during their sessions together, she had a duty, both legal and ethical, to disclose the threats to law enforcement or the target. (R. at 10). Thus, Dr. Morgan followed what she is legally and ethically bound to do under the law of the State of Boerum and the American Psychiatric Association by making Petitioner well aware of her duty.

On December 16, 2006, appellant arrived for his individual session, with full knowledge of Dr. Morgan's duty to warn and stated with respect to Mr. Kayne, "I will annihilate him before he can do anymore damage to the company. I hope he has his affairs in order, otherwise his family will be in trouble. Or maybe not, so they can go down with him." (R. at 11, 25). After Petitioner made this statement, Dr. Morgan reiterated her duty to warn that she had previously expressed to Petitioner at the outset of their psychotherapist-patient relationship. (R. at 11). Petitioner, therefore, was fully aware at the beginning of his relationship with Dr. Morgan that she had a duty to warn the target or law enforcement of any threats, but nonetheless proceeded to make a threat against Mr. Kayne. Thus, by making a threat against Mr. Kayne despite Dr. Morgan's duty to warn, Petitioner had no expectation of confidentiality in this threat and waived the psychotherapist-patient privilege.

Additionally, Petitioner's threat during a Stress Anger Depression ("SAD") grouptherapy session was also not confidential and therefore not covered by the psychotherapistpatient privilege. Dr. Morgan testified that when she recommends patients to attend group therapy sessions, she also reiterates the confidentiality limits she gives patients during their first private session. (R. at. 10). At a SAD group therapy session on January 20, 2007, Petitioner stated "I'll destroy Kayne financially if he does not keep his mouth shut." (R. at 13, 25). Just as Petitioner was informed of Dr. Morgan's duty to warn during his individual therapy session, Petitioner also was aware of Dr. Morgan's duty during the SAD group session. Therefore, when Petitioner threatened Kayne financially despite Dr. Morgan's duty to warn, there is no longer a reasonable expectation of confidentiality in that threat and Petitioner waived the psychotherapist-patient privilege. In sum, Petitioner had no reasonable expectation of confidentiality when he made threats during an individual session and an SAD group session because he knew of Dr. Morgan's duty to warn law enforcement or the target of any threats. Accordingly, the psychotherapist-patient privilege does not apply because Petitioner's threats were not confidential communications under *Jaffee*.

2. Petitioner's threats made during a group session and during a break in a SAD group therapy session were not confidential and not covered by the psychotherapist-patient privilege because they were made in the presence of a third party.

To stay true to the concepts that privileges "are not . . . expansively construed, for they are in derogation of the search for truth," *Nixon*, 418 U.S. at 710, and the psychotherapist-patient privilege should only apply to "confidential communications made to a licensed therapist [during] the course of diagnosis or treatment," *Jaffee*, 518 U.S. at 15, another limitation on the privilege has developed. At the heart of this limitation on the psychotherapist-patient privilege, as discussed above, is the confidentiality requirement. In fact, "it is vital to a claim of privilege that the communication have been made and maintained in confidence." *United States. v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976). However, the confidentiality of a communication can be easily destroyed by the presence of third parties, hence making the presence of third parties a limitation on the applicability of the psychotherapist-patient privilege. *See United*

States v. Auster, 517 F.3d. 312, 317 (5th Cir. 2008). In the context of the attorney client privilege, the Fifth Circuit noted that "courts have refused to apply the privilege to . . . communications made in the presence of third parties." *Pipkins*, 528 F.2d at 563. Although this case applied the presence of third parties to the attorney client privilege, the presence of third parties removing the confidentiality of a communication has been also acknowledged in the context of the psychotherapist-patient privilege. *See also United States v. Auster*, 517 F.3d 312, 317 (5th Cir. 2008) (acknowledging that the presence of third parties can "nullify" the confidentiality of a communication). It logically follows that when a communication is made in the presence of third parties, the patient no longer has a reasonable expectation of confidentiality in such communication because the third party is not under a duty to keep the information confidential. *See id.* Therefore, when a communication is made in front of a third party, the presence of the third party effectively acts as a waiver of the privilege. *See also Jaffee*, 518 U.S. at 15 n.14 ("Like other testimonial privileges, the patient may of course waive the protection.").

In this case, during a group SAD therapy session Petitioner threatened that he would "destroy Kayne financially if he does not keep his mouth shut." (R. at 13, 25). This threat was made in the presence of other group therapy members, which nullifies the confidentiality of the statement. Although Dr. Morgan informs her patients that the confidentiality information she gives to her patients during individual sessions also applies to group sessions (R. at 10), the other members of the group therapy session are under no such duty to keep information from the group therapy session confidential. Thus, when Petitioner made a threat against Mr. Kayne during a group SAD session, he had no reasonable expectation of confidentiality because of the presence of third parties—the other group members.

Additionally, Petitioner's threat made during a break in a SAD group therapy session is not covered by the psychotherapist-patient privilege because this threat was made in the presence of a third party outside of the therapy session. Dr. Morgan testified that in the middle of an SAD session on January 20, 2008, the group took a 10 minute break outside in the courtyard. (R. at 13). Dr. Morgan went outside with Petitioner and another group therapy member. (R. at 13). During this break, Petitioner stated that, "Alan Kayne is going to ruin everything I worked so hard to create. I'll show him. I won't let some mother effing S.O.B. destroy my company. I've been talking to some people and I'll get rid of him once and for all." (R. at 13, 25). Petitioner made this threat in the presence of another group therapy member, a third party, which removes any confidentiality associated with the threat. Moreover, this threat would also not be confidential because it was made during a break in the therapy session, which is not during the course of diagnosis or treatment because the group was no longer engaging in therapy at that point. Therefore, when Petitioner expressed his threat regarding Mr. Kayne during a break in a group therapy session in front of another group therapy member, he had no reasonable expectation of confidentiality because of the presence of a third party and because the group therapy was not currently in session. In conclusion, Petitioner's threats made during a group SAD therapy session and a break in a group SAD therapy session were not confidential because of the presence of third parties, and accordingly the psychotherapist patient privilege is inapplicable to those threats.

In summary, Petitioner's threats made during an individual therapy session, a group SAD therapy session, and a break in a SAD therapy session were not confidential communications made in the course of diagnosis or treatment, and thus, do not meet the requirements for the psychotherapist-patient privilege to be applicable under *Jaffee v. Redmond*.

B. EVEN IF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE APPLIED TO PETITIONER'S THREATS MADE DURING THERAPY WITH DR. MORGAN, PETITIONER'S THREATS WERE PROPERLY ADMITTED UNDER THE DANGEROUS-PATIENT EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

Petitioner's threatening statements fall within an exception to the psychotherapist-patient privilege, therefore making admission of Dr. Morgan's testimony regarding the threats proper. In Jaffee, this Court expressed approval of an exception to the psychotherapist-patient privilege by noting that "we have no doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or others can be averted only by means of disclosure by the therapist." 518 U.S. at 18 n.19. This has been recognized as the dangerouspatient exception to the psychotherapist-patient privilege. See United States v. Glass, 133 F.3d 1356 (10th Cir. 1999). Under the dangerous-patient exception to the psychotherapist-patient privilege, "a psychotherapist may testify about a threat made by a patient if 'the threat was serious when it was uttered and . . . its disclosure was the only means of averting harm . . . when the disclosure was made.' " United States. v. Chase, 340 F.3d 978, 985 (9th Cir. 2003) (quoting United States v. Glass, 133 F.3d 1356, 1360 (10th Cir. 1998)). Thus, this initiates the therapist's duty to warn, as previously discussed. See Tarasoff v. Regents Univ. of Cal., 551 P.2d 334 (Cal. 1976) (acknowledging that therapists have a duty to warn third parties or police of possible violence by the patient).

Some circuits, in declining to recognize the dangerous-patient exception, have narrowly misconstrued the footnote in *Jaffee* from which the dangerous-patient exception is founded. For instance, the Sixth Circuit has erroneously concluded that this Court was only referring to the possibility of a therapist testifying in the patient's involuntary commitment proceeding. *United States v. Hayes*, 227 F.3d 578, 585 (6th Cir. 2000). This conclusion, however, is incorrect because the *Jaffee* footnote "has stated in the plainest English that . . . 'the privilege must give

way' and did not indicate that it was only limited to involuntary commitment proceedings."

United States v. Chase, 340 F.3d 978, 995 (Kleinfeld, J., concurring) (quoting Jaffee v. Redmond, 518 U.S. 1, 18 n.19 (1996)). In actuality, the privilege that must give way is the "privilege not to testify in federal court," as well as during involuntary commitment proceedings. Id. It has been recognized that there is only "a marginal therapeutic benefit of allowing a therapist to divulge confidences and to testify in civil commitment hearings, but not in federal criminal trials." Auster, 517 F.3d at 319. Thus, the correct reading of the Jaffee footnote recognizes that "[the] patient's privilege to bar [the therapist's] testimony, does not exist 'if a serious threat of harm to the patient or to others can be averted only by means of disclosure by the therapist.' "United States v. Chase, 340 F.3d 978, 995 (Kleinfeld, J., concurring) (quoting Jaffee v. Redmond, 518 U.S. 1, 18 n.19 (1996)). In sum, "the context of the Jaffee footnote was the patient's privilege to bar her psychotherapist's testimony in federal court under Federal Rule of Evidence 501." Chase, 340 F.3d at 995 (Kleinfeld, J., concurring).

The dangerous-patient exception to the psychotherapist-patient privilege serves to protect the targets of threats before any serious harm can be inflicted upon them and also serves to protect public safety. *See People v. Wharton*, 809 P.2d 290, 308 (Cal. 1991). In protecting these interests it is immaterial whether or not the patient actually carries through with the threat; the threat only has to be serious when uttered and disclosure has to be the only way to avert harm. As the Court of Appeals correctly noted, it logically follows that the psychotherapist may testify about the threat in court after disclosure of the threat to the target, because otherwise would give a patient an incentive to carry out the threat. *See id.* (recognizing that "a dangerous patient could regain the protection of the privilege by simply killing the victim, certainly an absurd result").

Thus, the rationale behind the dangerous-patient exception is practical and serves the interest of protecting the public.

In this case, the threats made by Petitioner were serious when uttered and disclosure was the only way of averting harm. Therefore, the dangerous-patient exception is applicable, which makes Dr. Morgan's disclosure of the threats to Mr. Kayne and her subsequent testimony regarding Petitioner's threats proper. To support her conclusion that all of Petitioner's threats were serious when uttered, Dr. Morgan testified that Petitioner's "entire body was shaking" and that "his face was very red." (R. at 25). These physical manifestations by Petitioner, alone, served as a clear indicator to Dr. Morgan that Petitioner was very serious about his threats.

Petitioner's first threat was serious when uttered, making disclosure the only way of averting harm. During an individual therapy session with Dr. Morgan, Petitioner said with respect to Mr. Kayne, "I will annihilate him before he can do anymore damage to the company. I hope he has his affairs in order, otherwise his family will be in trouble. Or maybe not, so they can go down with him." (R. at 11, 25). Additionally, Dr. Morgan testified that Petitioner expressed "an angry concern that Kayne was trying to take defendant's position with the company." (R. at 25). This threat could have been reasonably construed by Dr. Morgan as a threat of physical harm against Mr. Kayne, especially because Mr. Kayne knew the market was in trouble and disagreed with Petitioner about warning the investors. (R. at 25). Moreover, Dr. Morgan could have reasonably believed this threat was serious because Petitioner was angry and feared that Kayne would take his position with the company. (R. at 25). This could indicate to Dr. Morgan that Petitioner had a motive to keep Kayne from taking his position. Therefore, Petitioner's first threat fell within the exception to the psychotherapist-patient privilege because it was serious when uttered and disclosure was the only means of averting harm.

With regard to appellant's second threat that he would "destroy Kayne financially if he does not keep his mouth shut," Dr. Morgan could have reasonably concluded that this was a serious threat of harm to Kayne. (R. at. 13, 25). Although this clearly is a threat against Kayne's financial well being, and not his physical well being, the dangerous-patient exception is not limited to threats of physical violence. Additionally, in the context of Petitioner's and Kayne's occupation and work environment in the financial world, it was reasonable to believe that Petitioner could seriously harm Kayne financially because of his extensive knowledge and skill within the financial world. Therefore, Petitioner's threat that he would financially destroy Kayne was serious when uttered and therefore properly admitted under the dangerous-patient exception.

Petitioner's third and final threat seemingly has the most serious implications of all three threats. In a break from a group therapy session, Petitioner stated that "Alan Kayne is going to ruin everything I worked so hard to create. I'll show him. I won't let some mother effing S.O.B. destroy my company. I've been talking to some people and I'll get rid of him once and for all." (R. at 13, 25). Dr. Morgan could have reasonably concluded that this threat was serious when uttered because Petitioner expressed that he had been talking to people, which indicates that Petitioner could have started taking steps toward carrying out his threat of getting rid of Kayne. This threat is also consistent with Petitioner's fear of exposure regarding HSCAM's problems. Thus, Dr. Morgan's disclosure of the threats to Mr. Kayne and subsequent testimony was proper under the dangerous-patient exception to the psychotherapist-patient privilege. In sum, when considering Dr. Morgan's testimony that Petitioner's body shook and his face turned red when he made these three threats, coupled with the context of each threat, the threats were serious when uttered and disclosure was the only means of averting harm. Therefore, Dr. Morgan's

testimony of Petitioner's threats was properly admitted under the dangerous-patient exception to the psychotherapist-patient privilege.

In conclusion, the psychotherapist-patient privilege does not apply to any of Petitioner's three threats made in therapy with Dr. Morgan. Alternatively, even if the psychotherapist-patient privilege does apply, the threats were properly admitted under the dangerous-patient exception to the psychotherapist patient privilege. Therefore, Petitioner's threats were properly admitted at trial, and for the reasons stated above, this Court should affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit.

II. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT PROPERLY CONCLUDED THAT AN EVIDENTIARY HEARING IS NOT REQUIRED WHEN A BIBLE PASSAGE IS ALLEGEDLY READ ALOUD DURING JURY DELIBERATIONS BECAUSE THE BIBLE IS NOT AN EXTERNAL SOURCE UNDER FEDERAL RULE OF EVIDENCE 606(b) BASED ON UNITED STATES SUPREME COURT PRECEDENT AND THE PURPOSE OF 606(b).

The Sixth Amendment to the United States Constitution guarantees the right of the accused, in criminal prosecutions, to trial by an "impartial jury." U.S. CONST. amend. VI. "The jury is an essential instrumentality . . . of the court, the body ordained to pass upon guilt or innocence." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Accordingly, once the jury passes upon guilt or innocence, "testimony of a juror is not admissible to impeach the jury's verdict." James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 St. John's L. Rev. 389, 391 (1991) (citing Lord Mansfield's famous opinion in *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785)). Consistent with this principle, Federal Rule of Evidence 606(b) prohibits admission of evidence pertaining to "any matter or statement occurring during the course of the jury's deliberations" absent a showing of one of three narrow exceptions. Fed. R. Evid. 606(b). The second issue in this case is whether the Bible falls

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¹ Federal Rule of Evidence 606(b):

within one of the three narrow exceptions in 606(b). The Fourteenth Circuit properly concluded that "the Bible should not be treated as an external influence." (R. at 53).

A. THE BIBLE IS NOT AN EXTERNAL SOURCE UNDER 606(B) BECAUSE IT DOES NOT AMOUNT TO "PRIVATE COMMUNICATION, CONTACT, OR TAMPERING" FOUND IN REMMER AND ITS POTENTIAL TO INFLUENCE IS FAR LESS SIGNIFICANT THAN JUROR INTOXICATION WHICH WAS NOT FOUND TO BE AN EXTERNAL INFLUENCE IN TANNER.

The threshold inquiry in determining the admissibility of juror testimony regarding deliberations is whether or not the alleged influence upon the jury was internal or external. *See* FED. R. EVID. 606(b); *Tanner v. United States*, 483 U.S. 107, 117 (1987). In *Remmer v. United States*, this Court held that "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954). The presumption is rebuttable, but the "burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant." *Id.* The pre-Federal Rules of Evidence decision in *Remmer* remains an accurate definition of the rigorous standard needed to find that an allegation amounts to an external influence.

Conversely, in *Tanner* this Court held that "possible *internal* abnormalities in a jury will not be inquired into except 'in the gravest and most important cases.'" *Tanner*, 483 U.S. at 119 (emphasis in original) (quoting *McDonald v. Pless*, 238 U.S. 264, 269 (1915)). Clarifying this point, the Fourth Circuit stated: "Tanner thus establishes that the Sixth Amendment's guarantees do not require judicial consideration of juror allegations regarding influences *internal* to the

⁽b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

deliberation process." *Robinson v. Polk*, 438 F.3d 350, 363 (4th Cir. 2006) (emphasis added). This Court has not directly addressed the issue of whether or not the Bible is an internal or external influence on the jury. (R. at 53). However, numerous circuit courts have spoken on the issue. *Compare Robinson*, 438 F.3d at 364 (holding that "the Bible is not an 'external' influence"), *and Fields v. Brown*, 503 F.3d 755, 780 (9th Cir. 2007) (en banc) (stating, in dicta, that Biblical verses are simply "notions of general currency that inform the moral judgment" of jurors), *with Oliver v. Quarterman*, 541 F.3d 329, 340 (5th Cir. 2008) (holding that the Bible is an external influence when the consulted passage speaks directly to the facts of the case), *and United States v. Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008) (declining to the treat the Bible as "qualitatively different from other types of extraneous materials or information that may taint a jury's deliberations"). Thus, there is disagreement between the circuits as to whether the Bible constitutes an outside influence under 606(b).

1. The Bible is not "private communication, contact, or tampering" because its popularity elevates it to common, public knowledge and its widespread use as a moral template is dissimilar to other situations where this Court has found an external influence.

This Court, in *Remmer*, explained the rigorous standard that must be met in order for an influence on the jury to be considered external for the purpose of allowing juror testimony to impeach the jury's verdict. In that case, a third party approached the jury foreman and "remarked to him that he could profit by bringing in a verdict favorable to the Petitioner." *Remmer*, 347 U.S. at 228. The Court concluded that the attempted bribery deprived the Petitioner of a fair trial. *Id.* In the late 19th century, the Supreme Court also ordered an evidentiary hearing to be held in regard to allegations that jurors had read a newspaper article concerning the case that had not been admitted into evidence. *Mattox v. United States*, 146 U.S. 140, 147 (1892). Further, this Court has also held that prejudicial statements (regarding the

defendant) by a bailiff to the jurors constituted grounds for reversal of a guilty verdict. *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam). Finally, this Court has also held that deputy sheriffs, who happened to be key witnesses, fraternizing with the jury constituted grounds to vacate a guilty verdict. *Turner*, 379 U.S. at 474.

In contrast to the above situations, the Bible is not the kind of private communication, contact, or tampering contemplated in *Remmer*. "Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." *Beck v. Alabama*, 447 U.S. 625, 642 (1980). The Bible is easily one of the most widely read texts in America. It is referenced in churches and schools across America as a moral template to aid in decision-making for a countless number of people. The pervasiveness of the Bible in our society and the impact it has on questions of morality elevate it above its tangible form. Asking jurors to disregard the text upon which their own faith is based when deciding questions of morality would be an incredible feat for jurors to accomplish. Unlike contact with third parties or the text of fact-specific newspaper articles, the Bible provides moral guidance through somewhat vague language that is meant to be interpreted in a multitude of ways—with the ultimate goal of arriving at the proper moral decision.

Further, suppose that the Bible passage in question had merely been recited or paraphrased from the Juror's memory. As this Court stated in *Beck*, jurors do not leave behind their life experiences when they step into the jury box. From an administrability standpoint, our judicial system would be turned on its head if inquiry into the source of every juror comment was permitted. It is one thing to supplement the record with evidence not properly admitted; it is quite another for jurors to consult intangible ideologies for guidance in making decisions during

deliberations. Simply stated, the Bible does not meet the rigorous external standard explained in *Remmer* and applied to 606(b).

2. The Bible's moral lessons are far less intrusive than juror intoxication during trial because Bible passages merely provide faith-based advice while intoxication fundamentally alters the minds of jurors.

The internal/external distinction on juror influence was further explained by this Court in *Tanner*. Unlike *Remmer*, this case was decided after adoption of the Federal Rules of Evidence, and the opinion cites 606(b) in full. *Tanner*, 483 U.S. at 121. In *Tanner*, an unsolicited juror visited the defendant's attorney after the guilty verdict had been entered. *Id.* at 115. The juror claimed that "the jury was one big party." *Id.* He alleged that at least seven jurors consumed alcohol during recesses, four jurors smoked marijuana "quite regularly," and two jurors ingested cocaine. *Id.* at 115-16. Tanner's attorney moved for a new trial, but that motion was denied by the District Court. *Id.* Both the Court of Appeals for the Eleventh Circuit and the United States Supreme Court affirmed. *Id.*

In affirming, this Court held: "However severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep." *Id.* at 122. By holding that juror intoxication did not amount to an "outside influence," the clear implication of the *Tanner* holding calls for an extremely restrictive application of the 606(b) "outside influence" exception. Thus, the text that acts as the moral compass for a countless number of jurors cannot be considered an outside influence in light of the holding in *Tanner*.

B. Granting an evidentiary hearing absent a showing of egregious interference with jurors would undermine the policy reasons behind adoption of Federal Rule of Evidence 606(b).

Federal Rule of Evidence 606(b) was adopted to strike a balance between several important policy considerations. On one hand, the Sixth Amendment guarantees the right to trial by an impartial jury, and there is also need for that jury's decision to be based solely on the evidence adduced at trial. On the other hand, the needs of verdict finality and preservation of the sanctity of deliberations chip away at their competing counterparts. The plain language of the Sixth Amendment would lead one to believe that any testimony which introduces any evidence tending to show influence on jurors would be relevant and admissible as a constitutional requirement. The problem with that approach, if taken too far, is that it would invite constant tampering with juries and even undermine the original goal of preserving an impartial jury. Congress was fully aware of these concerns, and it adopted 606(b) as a compromise.

1. Federal Rule of Evidence 606(b) is intended to ensure the need of verdict finality and the sanctity of jury deliberations while minimally impinging upon the right to an impartial jury and a verdict based solely on the evidence adduced at trial.

In order for there to be an impartial jury, the jurors must believe that their deliberations will be kept confidential. A juror who believes that his statements will be announced simultaneously with the verdict will be disinclined to adopt any viewpoint divergent with the majority or others important to the juror. Further, post-verdict pressure will be applied (in varying degrees) to all jurors by persons who disagree with the outcome. This kind of pressure would undoubtedly prevent jurors from expressing their opinions truthfully. Ultimately, a toothless rule allowing juror impeachment of her own verdict would completely undermine the Sixth Amendment's goal of providing defendants with impartial juries.

Another policy consideration behind 606(b) is the need for verdict finality. Confidence in our judicial system is of utmost importance to the parties in each dispute, as well as society in general. Without adequate assurance that a verdict is, and will remain, final, parties cannot

resume their pre-litigation lives. Additionally, a judicial system that does not produce finality for disputes will deter potential parties from using the system. This could potentially resurrect archaic concepts of self-help that our judicial system was intended prevent. Without verdict finality, party perception and public perception of our judicial system would be greatly limited.

The obvious counter argument to these important policy goals is rooted in the language of the Sixth Amendment—guaranteeing the right to an impartial jury. Proponents of the impartial jury at all costs approach fail to consider the equally important considerations stated above. In fact, allowing inquiry into the processes jurors undertook to reach a verdict would wholly subvert the notion of an impartial jury. Any juror who knew her verdict could be subjected to scrutiny would have disincentive to be impartial in the first place. Instead, jurors would be forced to make decisions taking into consideration any potential backlash from their family, friends, co-workers, and the public.

To address these issues, Congress enacted 606(b). The plain language lays out the general rule that a juror may not impeach her own verdict. To address the need for a fair and impartial jury, 606(b) goes on to delineate three narrow exceptions to the general rule. In substance, the two most important of the narrow exceptions address limited situations where testimony of interference on the deliberative process would have unduly affected the outcome of the trial. Thus, a juror may only impeach her verdict when "(1) extraneous prejudicial information was improperly brought to the jury's attention [or when] (2) any outside influence was improperly brought to bear upon any juror." FED. R. EVID. 606(b).

2. <u>Consistent with the policy considerations underlying rule 606(b), the Bible</u> does not fall within either of the two main exceptions to the rule.

The wording of the two main exceptions is surprisingly similar and it is easy to merge the two concepts into one. However, closer examination reveals distinct, albeit minor, differences.

The first main exception appears to address situations where prejudicial information is brought to the jury's attention that is not admitted into evidence. This most likely takes the form of newspaper articles, television newscasts, and statements not made in court by any person with knowledge of the proceeding. The key to this exception is that for the information to be prejudicial, it must be fact-specific to the proceeding on some level. The second exception is more difficult to conceptualize, but nonetheless, it can be distinguished from the first exception. It requires that an "outside influence" has some effect on the jury. This would seem to encompass situations where anyone attempts to bribe the jury, threaten the jury, or where non-prejudicial information has an impact on deliberations.

It would be difficult to classify the Bible as falling within the first exception since it was written so long ago that it would rarely be considered to contain fact-specific prejudicial information. However, the Bible could much more plausibly be construed to fall within the second exception as an outside influence containing non-prejudicial information. Nonetheless, classifying the Bible as an outside influence would contravene the purpose of 606(b) and could draw countless verdicts into question. Thus, classifying the Bible fall within either exception would completely undermine the need for verdict finality that is implicit in 606(b).

As stated above, the pervasiveness of the Bible and its use as a moral compass for many individuals elevate it above its tangible form. A great number of people conform their conduct to comport with the teachings of the Bible, and many are able to reference the principles it contains without even opening the book. If the Bible were to be classified as an "external influence," then losing counsel would have incentive to question every juror about her thought process behind reaching her verdict.

In many instances, jurors' moral notions are rooted in the Bible or similar religious texts. Astute counsel would nearly always find a way to trace a decision back to the Bible or another moral code. This result would force jurors to abandon the very text which has guided their moral decisions throughout life when they enter the jury box and take an oath to make decisions regarding the fate of others that requires reference to one's own morals. By creating incentive for losing counsel to investigate every deliberative process, the need for verdict finality is destroyed by classifying the Bible as an external influence. Simply stated, the Bible is not the kind of egregious interference that warrants destruction of the sound policy reasons underlying the adoption of Rule 606(b).

C. EVEN IF THE BIBLE COULD PLAUSIBLY BE CONSIDERED AN EXTERNAL SOURCE, THE PASSAGE IN QUESTION BEARS SUCH LITTLE RESEMBLANCE TO THE FACTS OF THIS CASE THAT IT COULD AMOUNT TO NOTHING MORE THAN HARMLESS ERROR.

As this Court stated in *Remmer*, evidence that an external influence had been brought to bear upon the jury is "presumptively prejudicial." *Remmer*, 347 U.S. at 229. However, the presumption of prejudice can be rebutted by the Government. *Id.* In nearly every case the Petitioner will cite as supporting the assertion that the Bible is an external source for the purposes of 606(b), those courts declined to adopt a *per se* rule that the Bible is an "outside influence." Instead, nearly every court proceeded to determine the alleged impact the exact verse from the Bible had on the jurors in the case at bar.

The Eleventh Circuit began its analysis by quoting this Court and it said that "any evidence that does not 'come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel' is presumptively prejudicial." *McNair v. Campbell*, 416 F.3d 1291, 1307 (11th Cir. 2005) (quoting *Turner*, 379 U.S. at 473). In *McNair*, the jury foreman was a Christian minister

who "brought a Bible into the jury room during deliberations, read aloud from it, and led the others in prayer." *McNair*, 416 F.3d at 1301. The defendant claimed that since the Bible had not been admitted into the record, its use constituted extraneous evidence and grounds for reversal under the Sixth Amendment. *Id.* The passages in question were Psalms 121, entitled "The Lord Our Protector," and Luke 6:37, entitled "Judging Others." *Id.* at 1308 n.16. Luke 6:37 reads as follows: "Do not judge others, and God will not judge you; do not condemn others and God will not condemn you; forgive others and God will forgive you." *Luke* 6:37 (Good News Bible).

The lower court rejected McNair's argument stating that "neither of these scriptures contain material which would encourage jurors to find a defendant guilty or to recommend the death penalty." *McNair v. State*, 706 So. 2d 828, 837 (Ala. Crim. App. 1997). The Eleventh Circuit accepted the lower court's ruling and stated that the Government had carried its burden (under *Remmer*) in rebutting the presumption of prejudice: "Because we know the *innocuous nature of the passages* that [the Minister] read, and because we know that the passages and prayers merely had the effect of encouraging the jurors to take their obligations seriously and to decide the question of guilt or innocence based only on the evidence." *McNair*, 416 F. 3d. at 1309 (emphasis added).

Additionally, in *Coe v. Bell*, the Sixth Circuit analyzed statements made by a prosecutor in his closing argument in a capital case. *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998). The prosecutor's words are as follows:

I'm not a biblical scholar, ladies and gentlemen, and I don't pretend to be. But I would simply emphasize to you that the whole cornerstone of our law, the law of

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² Psalms 121: The Lord Our Protector

[&]quot;I look to the mountains; where will my help come from? My help will come from the Lord, who made heaven and earth. He will not let you fall; your protector is always awake. The protector of Israel never dozes or sleeps. The Lord will guard you; he is by your side to protect you. The sun will not hurt you during the day, nor the moon during the night. The Lord will protect you from all danger; he will keep you safe. He will protect you as you come and go now and forever. *Psalms* 121 (Good News Bible).

this land, the law of society is based upon those scriptures where it was established from, and the Bible and the scriptures themselves are replete with those circumstances where capital punishment has been applied. It's applied in reference to both the Old Testament and the New Testament. Whosoever sheddeth man's blood, by man shall his blood be shed. Terms are mentioned regularly throughout the Old and the New. And I just want to ask you to put your mind at rest if that in any way has created any conflict because there's certainly foundation for capital punishment in the Bible and in the scriptures themselves. *Id.* (emphasis added).

The court found the statements "inappropriate," but it declined to hold that the prosecutor's words amounted to reversible error. *Id.* Without holding that the presence of the Bible in the jury room amounted to reversible error, the court simply stated: "The cases that Coe cites for the contrary proposition involve cases in which a Bible was in the jury room; there is error in those cases not because the book was the Bible, but because the book was not properly admitted evidence." *Id.* Once again, a circuit court declined to find that a tangential reference to the Bible amounted to an actionable outside influence under Federal Rule of Evidence 606(b).

State supreme courts have also passed on the issue of the Bible serving as an outside influence. In a capital case, California has held that "bringing a copy of the Book of Numbers passage into the jury room, and passing it around to the others" was "misconduct." *People v. Danks*, 82 P.3d 1249, 1275 (Cal. 2004). However, this misconduct did not have the likely effect of influencing other jurors: "[N]othing in [the Book of Numbers verses], viewed objectively . . . was inherently and substantially likely to influence [or] bias the jurors." *Id.* The California Supreme Court then went on to hold that neither the juror's act of brining in the passage showed a substantial likelihood of that juror's actual bias, nor did it likely result in bias for the other jurors. *Id.* In Colorado, jurors were exposed to Biblical passages that directly mandated the death penalty in a capital case. *People v. Harlan*, 109 P.3d 616, 631 (Colo. 2005). The Colorado Supreme Court held: "A religious text mandating the death penalty meets the . . . standard of extraneous information creating a reasonable possibility that a typical juror would be

influenced in voting on the verdict." *Id.* Additionally, in Tennessee a jury foreman "buttressed his argument for imposition of the death penalty by reading to the jury selected biblical passages." *State v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981). The Tennessee Supreme Court concluded that the foreman's conduct "was error which would have required a *new sentencing hearing*" for the death penalty. *Id.* (emphasis added). Finally, in Pennsylvania a prosecutor, in his closing argument, said "Karl Chambers has taken a life. As the Bible says . . . a murderer shall be put to death." *Commonwealth v. Chambers*, 599 A.2d 630, 643 (Pa. 1991) (internal citations omitted). The Pennsylvania Supreme Court stated that the prosecutor's conduct was intended to substitute an "independent source of law . . . for the conclusion that the death penalty is the appropriate punishment." *Id.* at 634. The theme is that each case was a capital case, and biblical language was used to find in favor of sentencing the defendant to death.

1. <u>Unlike the "eye for an eye" language which may influence retribution in capital cases, the language of this passage speaks of "selling doves" in the "temple of God" which is fundamentally dissimilar to the crimes of securities and wire fraud.</u>

The defendant in this case was charged and convicted on two counts of wire fraud and one count of securities fraud. (R. at 44, 47). The Biblical verse that allegedly contributed to the jury concluding he was guilty comes from Matthew 21: 12-13 and reads as follows:

And Jesus went into the temple of God, and cast out all of them that sold and bought in the temple and overthrew the tables of the moneychangers, and the seats of them that sold doves, And said unto them, It is written, My house shall be called the house of prayer; but ye have made it a den of thieves. (R. at 48 n.3).

The crime of murder has been committed since the inception of man, and it can still be committed in same factual manner as it was in the Bible. On the other hand, wire and securities fraud are relatively new forms of the crime of theft. Accordingly, they are not mentioned anywhere in the Bible. The passage in question speaks only of selling doves in the house of the

Lord. There is no evidence that the defendant in this case committed any of his crimes within the confines of a church, that his crimes involved the sale of doves, or that he ever even attended church. The only two words in the entire passage that could properly be attributed to the defendant are "moneychangers" and "thieves;" and a close reading of the passage reveals that the only reason why the "moneychangers" are classified as "thieves" is because they were engaging in commerce inside the "temple of God."

Further, the passage in question could plausibly be interpreted to mean that the merchants in the "temple of God" were "thieving" the churchgoers of the opportunity to come to know God free from commercial influences. This interpretation would obliterate any plausible link between the passage and the defendant's crime. Wire and securities fraud have no religious connotations, and it would be improper to analogize the act of committing them to the act of preventing a churchgoer from coming to know God.

The courts in the cases cited above were all willing to find that the Bible could potentially be seen as an outside influence on the jury. However, each case was a capital case and involved imposition of the death penalty on the defendant. The Bible speaks directly to the crime of murder and makes references to retribution for loved ones of the person murdered. It seems logical that a prosecutor using the Bible to influence the jury (when the Bible had not been admitted into evidence) in closing argument would be misconduct on the part of the prosecutor. This is true only because the Bible directly speaks to the crime of murder. It does not require an attenuated line of inferences to be drawn to make that deduction.

Even in what is perhaps the Petitioner's strongest case supporting this issue, *Oliver v*.

Quarterman, the Fifth Circuit stated: "[W]hen a juror brings a Bible into the deliberations and points out to her fellow jurors specific passages that describe the very facts at issue in the case,

the juror has crossed an important line." *Oliver*, 541 F.3d at 339 (emphasis added). The specific passage in question in this case cannot properly be found to describe the facts of this case. An attenuated line of inference upon inference would be required to analogize selling doves in the temple of God to the crimes of wire and securities fraud. Simply stated, while the link between murder and certain biblical references may have been proper, no such link exists here between modern forms of fraud and this biblical passage.

2. Even if the Court was willing to accept the attenuated link between the passage in question and the facts of this case, there is insufficient evidence to show that the passage was the sole or primary influence upon the jury.

At the conclusion of trial, the jury began deliberations at 11:30 a.m. on June 19, 2007. (R. at 27). By 5:30 p.m. the following day, the jury was at an apparent impasse and it sent the court a note that said: "Despite our best efforts we have not been able to reach a unanimous decision and are quite sure that we will not ever be able to agree." (R. at 28). The court then admonished the jury that it was "highly desirable that you agree upon a verdict." (R. at 28). The court went on to say that those who were in the substantial minority for either conviction or acquittal should reconsider the evidence because it was the jury's duty to agree upon a verdict if it can do so. (R. at 29). The jury then reached a unanimous verdict on the third day of deliberations (R. at 30).

According to the affidavit of Cynthia Stockton, three jurors ate dinner together after the second day of deliberations. (Aff. at ¶ 6). The three jurors discussed several items that referenced the Bible. (Aff. at ¶¶ 7-9). The next morning, Juror #3 pulled out a sheet of paper and read the passage in question aloud. (Aff. at ¶ 14). After the passage was read aloud, Juror #8 stated, "If it's good enough for Jesus, it's good enough for me. I want to change my vote to guilty." (Aff. at ¶ 17). Two other jurors then changed their votes, and Juror #6 said that she got "caught up in the moment" and did the same. (Aff. at ¶ 18).

Considering the events that transpired before the jury reached a unanimous verdict, it is not entirely certain that the passage in question influenced jury's decision. While it is true that Juror #8 directly referenced the passage before changing his decision, Juror #8 most likely would have changed his decision for any number of reasons, including a reason that was properly admitted into evidence. This is so because of the court's instruction that it is the jury's duty to reach a unanimous verdict. Hypothetically, the two other jurors may have simply agreed with Juror #8 because of his reputation among the jurors or because they were quite willing to change their decision at that point in deliberations. Juror #6 implied that the phenomenon of crowd psychology influenced her decision because she did not want to be the sole juror to disagree.

This uncertainty demonstrates the exact reason why Federal Rule of Evidence 606(b) was enacted in the first place. If juror testimony on matters like these was permissible, then every verdict would remain in doubt. This would create an incentive for losing parties and counsel to harass jurors to find any minor reason to vacate verdicts. Simply stated, 606(b) preserves the sanctity of deliberations, ensures finality, and prevents impeachment of verdicts by the very jurors who arrived at those verdicts. Allowing inquiry into the deliberations of this case would violate the maxim that a juror may not impeach her own verdict and be in derogation of the text of Federal Rule of Evidence 606(b).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Fourteenth Circuit should be affirmed.

Respectfully Submitted,
Counsel for Respondent, 31