

THE FACT-FINDING PROCESS REVIEW MODEL: REMEDYING FACT- BASED CONSTITUTIONAL CHALLENGES ON FEDERAL HABEAS CORPUS REVIEW

*Now they'd come so far and they'd waited so long
Just to end up caught in a dream where everything goes wrong
Where the dark of night holds back the light of day
And you've gotta stand and fight for the price you pay¹*

INTRODUCTION

Faced with the sober task of determining whether to impose the death sentence upon a fellow citizen, a juror reaches for spiritual guidance to ease his decision.² He holds the Bible in his hands and reads, “[t]he revenger of blood himself shall slay the murderer: when he meeteth him, he shall slay him.”³ After deliberation, the jury sentences the defendant to death.⁴ Later, the defendant discovers that during deliberations several jurors read specific Biblical passages instructive as to the rightful fate of a murderer.⁵ Despite jurors’ admissions that they consulted the Bible, the trial court finds that the jurors’ actions were not improper and the condemned defendant was not deprived of his constitutional right to an impartial jury.⁶ Per federal law, this finding receives a presumption of correctness that haunts the defendant’s direct appeal, state habeas proceedings, and federal petition for writ of habeas corpus.⁷ But was the state court’s

1. BRUCE SPRINGSTEEN, *The Price You Pay*, on *THE RIVER* (Columbia Records 1980).

2. See generally *Oliver v. Quarterman*, 541 F.3d. 329, 331 (5th Cir. 2008) (finding the jury’s consultation of the Bible during sentencing deliberations was not prejudicial to the defendant in determining the outcome of a capital murder case).

3. *Id.* at 332 n.3 (quoting *Numbers* 35:19 (King James)).

4. *Id.* at 331.

5. *Id.* at 331–32.

6. *Id.*

7. For example, Khristian Oliver appealed his state capital conviction and

finding of fact reasonable? And shouldn't reasonableness matter if the loss of life and liberty is the price the defendant pays?

The "great writ,"⁸ or the writ of habeas corpus, reflects the long-standing principle that an individual who believes that he is unlawfully imprisoned should have recourse to challenge his confinement.⁹ A state court effectively denies an individual this right when, as a precursor to federal habeas corpus review, the court fails to comprehensively find all pertinent facts and explain their relevance. This failure has far-reaching repercussions when the state court does not adequately support its factual findings regarding allegations of extrinsic influence on jury deliberations and possible jury bias.¹⁰

The guarantee of an impartial jury is a hallmark of the United States legal system and arguably the most important aspect of a criminal trial.¹¹ The current standard for habeas corpus review significantly restricts the habeas court's ability to rectify blatant incidents of jury prejudice when the state court makes contrary factual findings concerning jury bias.¹² A

sentence on direct appeal, in both state and federal habeas corpus proceedings, on the ground that the jury improperly consulted the Bible during sentencing deliberations. However, Oliver was denied at each stage of appeal due to the factual findings made at an evidentiary hearing by the trial court. *See Oliver v. State*, No. 73, 837 (Tex. Crim. App. April 17, 2002) (per curiam) (unpublished) (conviction and death sentence affirmed); *Oliver v. Texas*, 537 U.S. 1161 (2003) (petition for writ of certiorari to Court of Criminal Appeals of Texas denied); *Oliver v. Texas*, 538 U.S. 1001 (2003) (petition for writ of certiorari to Court of Criminal Appeals of Texas denied); *Oliver v. Quarterman*, 254 Fed. App'x 381, 383 (5th Cir. 2007) (per curiam) (certificate of appealability granted on two issues, denied on remaining).

8. *Ex parte Bollman*, 4 Cranch 75, 95 (1807).

9. *See Clark D. Forsythe, The Historical Origins of Broad Federal Habeas Corpus Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1087 (1995).

10. *See discussion infra* Part II.C.

11. *See Parker v. Gladden*, 385 U.S. 363, 364-65 (1966) (per curiam) ("If there is anything wrong [in finding the petitioner guilty] the Supreme Court will correct it. . . . The trial court found 'that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the [petitioner].'" (alteration in original); *Remmer v. United States*, 347 U.S. 227, 229 (1954) ("In a criminal case, any private communication, contact, or tampering . . . with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial . . .").

12. *See Oliver v. Quarterman*, 541 F.3d. 329, 343 (5th Cir. 2008) ("The determination of whether there was any improper conduct and its [e]ffect, if any, on juror impartiality are questions of historical fact that 'must be

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petitioner may successfully demonstrate to the habeas court that an external influence improperly influenced the jury during deliberations.¹³ He is still required, however, to rebut the presumption of correctness given to state court factual findings with an additional showing of clear and convincing evidence.¹⁴ The petitioner's ability to overcome this obstacle is further frustrated by a lack of consensus on what evidentiary showing meets the burden.¹⁵ Combined, the presumption of correctness and the evidentiary challenges of rebuttal result in mandatory deference to state court factual findings—even when such findings are unreasonable. Thus, inadequate state fact-finding often hinders a habeas court's review for constitutional error because the habeas court is unable to correct instances of

determined, in the first instance', by state courts and deferred to, in the absence of 'convincing evidence' to the contrary, by the federal courts.'" (quoting *Rushen v. Spain*, 464 U.S. 116, 120 (1983)) (alteration in original).

13. *Id.* at 340.

14. 28 U.S.C. § 2254(e)(1) (2006) states:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Id.

15. *Compare* *Lopinto v. Haines*, 441 A.2d 151, 155–56 (Conn. 1981) (“[T]he burden of persuasion is sustained if the evidence ‘induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true . . . is substantially greater than the probability that they are false or do not exist.’” (quoting *Dacey v. Conn. Bar Ass’n*, 368 A.2d 125 (Conn. 1976)), *and* *Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 574–75 (Haw. 1989) (“It is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable.” (quoting *Welton v. Gallagher*, 630 P.2d 1077, 1081 (1981))), *with* *First Nat’l Bank of Roland v. Rush*, 785 S.W.2d 474, 479 (Ark. 1990) (“[E]vidence by a credible witness whose memory . . . is distinct, whose narration of the details is exact . . . , and whose testimony is . . . convincing as to enable the factfinder to come to a clear conviction, without hesitance . . .”), *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (“[T]here must not only be evidence to support the relevant finding but also that evidence must produce ‘a firm belief or conviction that the allegation is true.’” (quoting *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 621, 2004 WL 3019205, at *11 (Tex. 2004))), *and* CALIFORNIA JURY INSTRUCTIONS § 2.62 (Fall 2008) (“‘Clear and convincing’ evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact[s] for which it is offered as proof.”) (alteration in the original).

probable constitutional violation.

The failure of habeas corpus review in this context mandates the implementation of a new procedural model. This Note proposes a new review model for fact-based constitutional challenges. Part I of this Note describes how modern federal habeas corpus law hinders habeas courts from conducting satisfactory review of fact-based constitutional challenges. Part II addresses issues of habeas corpus fact-based review in the context of jury bias claims and presents a test case, *Oliver v. Quarterman*, to illustrate such issues. Part III introduces the reasoning-process review model, a proposal developed to resolve problems related to habeas corpus review of findings of law. Part III also proposes that a similar model would resolve problems related to habeas corpus review of findings of fact. Part IV demonstrates how federal habeas courts should review state findings of fact by applying the fact-finding process review model to *Oliver v. Quarterman*, and offers policy reasons in support of adopting the fact-finding model for federal habeas corpus review.

I. FEDERAL HABEAS CORPUS HINDERS SATISFACTORY REVIEW OF FACT-BASED CONSTITUTIONAL CHALLENGES

In the United States, when a prisoner believes his confinement violates a constitutionally protected right, he may seek a writ of habeas corpus to challenge the legality of his conviction.¹⁶ If the reviewing state court upholds a prisoner's conviction on direct appeal, he may not challenge his confinement in federal habeas court until he has petitioned for post-conviction relief in state court.¹⁷ His petition for post-

16. 28 U.S.C. § 2254(a) states:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Id.

17. *See id.* § 2254(b)(1)(A). For the purposes of this Note, "habeas court" refers to any federal court that hears a petition for writ of habeas corpus. In the American justice system, no specific habeas court exists. Instead, the habeas court is the first federal court to hear the petition, which can be a federal district court, a circuit court, or the Supreme Court of the United

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conviction relief must allege that the state has violated his state or federal constitutional rights.¹⁸ Only after state court post-conviction proceedings are complete may the defendant petition for a writ of habeas corpus in federal court on the grounds of federal constitutional violation.¹⁹ The habeas corpus standard of review used by the Supreme Court when reviewing constitutional questions has varied over time.²⁰ The current standard states that a court will not grant a writ of habeas corpus unless:

[T]he adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.²¹

At first glance, the language appears to give the habeas court latitude in evaluating both the state court's legal and factual reasoning.²² The habeas court's analysis, however, is severely constrained by the guideline that "state court findings of fact are correct unless there is affirmative proof that the findings are inadequate."²³ The deference afforded to state

States. *See id.* § 2254(a).

18. *See id.* § 2254(a).

19. *See id.* § 2254(b)(1)(A).

20. Steven Semeraro, *A Reasoning-Process Review Model for Federal Habeas Corpus*, 94 J. CRIM. L. & CRIMINOLOGY 897, 903 (2004) (describing the history of federal habeas corpus standard of review and specifically whether the Court in *Brown v. Allen*, 344 U.S. 443 (1952) acknowledged that de novo review was appropriate for federal habeas claims). *But see* *Wright v. West*, 505 U.S. 277, 287 (1992) (holding that *Brown* did not present the Court with the opportunity to "explore in detail the question of whether 'satisfactory' conclusion was one that the habeas court considered *correct*, as opposed to merely *reasonable*"). A detailed discussion of the history of federal habeas corpus and the standard of review employed by the Supreme Court is beyond the scope of this Note.

21. 28 U.S.C. § 2254(d)(1)–(d)(2) (codifying the principles set forth in Antiterrorism and Effect Death Penalty Act of 1996).

22. While it appears that the habeas court can review a state court's decision, a state court can misinterpret or misapply federal law or fail to provide articulated reasoning to justify findings of fact which the habeas court is powerless to correct.

23. *Teague v. Scott*, 60 F.3d 1167, 1169–70 (5th Cir. 1995) (citing 28 U.S.C. § 2254(d)); *see also* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct.").

court factual findings is further complicated by the unclear evidentiary burden required to overcome the presumption of correctness.

A. The Presumption of Correctness Afforded to State Court Factual Findings Binds Habeas Review

State court findings of fact are automatically deemed correct and beyond the habeas court's power of review if the habeas petitioner cannot rebut the presumption of correctness awarded to him.²⁴ In this context, the factual findings of the state court's evidentiary hearing are the gateway to a subsequent habeas corpus petition because of the protective effect of the presumption of correctness. Consequently, the factual findings that follow state court evidentiary hearings often determine the success or failure of habeas petitions based on factual challenges.

The federal habeas court must exercise great deference toward state court factual findings.²⁵ For example, in cases of jury bias where jurors consult the Bible, the court often makes factual findings after hearing testimony on the content of the passages consulted and the role the passages played during sentencing deliberations.²⁶ The trial court then enters a finding on the determination of jury bias.²⁷ If the trial court finds that jury misconduct took place and the Bible influenced the jury's verdict, the court may vacate the defendant's conviction or order a new trial.²⁸

Conversely, if the trial court finds the Bible did not improperly influence the jury, the court enters a finding that the jury was not biased and deprivation of the defendant's constitutional right to an impartial jury did not occur.²⁹ This, combined with poorly-articulated support for the finding, renders the habeas court powerless to recognize and remedy a constitutional violation because the court is unable to view relevant evidence that would otherwise support the petitioner's claim. The presumption of correctness built into federal habeas

24. See 28 U.S.C. § 2254(e)(1).

25. See *id.*

26. See *Oliver v. Quarterman*, 541 F.3d 329, 331–32 (5th Cir. 2008); *People v. Harlan*, 109 P.3d 616, 622–23, 629 (Colo. 2005).

27. See *Harlan*, 109 P.3d at 629.

28. See *id.* at 633–34.

29. *Oliver*, 541 F.3d at 332.

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corpus review effectively cements this factual finding in the record.³⁰ Although the opportunity to petition a federal court exists, the finding of lack of jury prejudice overshadows the habeas process. Thus, the petitioner's opportunity for review effectively ends the moment the state court enters its factual finding.

The language of the federal law purports to give the petitioner an opportunity to overcome the presumption of correctness. This remedy, however, is illusory at best. This is because the evidentiary standard necessary to overcome the presumption is inherently ambiguous.

B. The Ambiguous Evidentiary Standard for Rebuttal of the Presumption of Correctness

A petitioner seeking a writ of habeas corpus must rebut the presumption of correctness awarded to state court factual findings with clear and convincing evidence.³¹ Overcoming the presumption of correctness generally requires evidence that is more convincing than the "preponderance of the evidence" standard and does not foster serious or substantial doubt.³² This burden is difficult to meet, however, because no single definition for clear and convincing evidence exists.³³ Judicial commentary

30. *See id.* at 332–35, 343.

31. 28 U.S.C. § 2254(e)(1) (2006).

32. *See* CALIFORNIA JURY INSTRUCTIONS § 2.62 (Fall 2008) ("Clear and convincing' evidence means evidence of such convincing force that it demonstrates . . . a high probability of the truth of the fact[s] for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence.") (alteration in original).

33. *Compare* *Oliver v. Quarterman*, 541 F.3d 329, 343 (5th Cir. 2008) ("The determination of whether there was any improper conduct and its [e]ffect, if any, on juror impartiality are questions of historical fact that 'must be determined, in the first instance', by state courts and deferred to, in the absence of 'convincing evidence' to the contrary, by the federal courts." (quoting *Rushen v. Spain*, 464 U.S. 116, 120 (1983))) (alteration in original), *with* *First Nat'l Bank of Roland v. Rush*, 785 S.W.2d 474, 479 (Ark. 1990) ("[E]vidence by a credible witness whose memory . . . is distinct, whose narration of the details is exact . . . , and whose testimony is . . . convincing as to enable the factfinder to come to a clear conviction, without hesitation"), *and* *Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 574–75 (Haw. 1989) ("It is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable." (quoting *Welton v. Gallagher*, 630 P.2d 1077, 1081 (1981))).

on what satisfies the clear and convincing evidence standard is also lacking.³⁴ As a result, federal habeas courts have decided comparable cases differently despite remarkably similar factual circumstances.³⁵ The lack of clear guidance regarding this evidentiary burden creates a greater obstacle for petitioners seeking to rebut the presumption of correctness. This unclear standard,³⁶ combined with mandatory deference to lower court factual findings, frustrates a federal court's ability to grant a writ even when presented with a poorly-reasoned state court decision.³⁷

34. See *Petition for Writ of Certiorari, Century Clinic, Inc. and Katrina Tang v. United States*, No. 99-1034, 1999 WL 33639936, at *10 (9th Cir. Dec. 13, 1999). The Petitioners call for the Supreme Court of the United States to reconcile varying definitions of the "clear and convincing" standard as it relates to a contempt of court order. *Id.* at *9-10. The petition states: "Inconsistent application of the standard directly contravenes principles of uniformity and consistency in the law, and, to the extent tolerated, bears directly on considerations of fundamental fairness and due process." *Id.* at *10.

35. Compare *Oliver v. Quarterman*, 541 F.3d 329, 343 (5th Cir. 2008) (holding that while the jury's use of the Bible during capital deliberations, specifically *Numbers* 35:16-19, commanding the death penalty for murder, was improper, the use of the Bible was a harmless error because Oliver failed to present "clear and convincing" evidence that the presence of the Bible was prejudicial), with *People v. Harlan*, 109 P.3d 616, 622-23 (Colo. 2005) (holding that a jury's use of Bible passages, specifically *Romans* 13:1 and *Leviticus* 24:20, which command the death penalty for murder, was inappropriate during capital deliberations and resulted in a sentence of life imprisonment without the possibility of parole).

36. The law consists of rules and standards. Rules are explicit whereas standards are less straightforward. Legal standards are favored when the specificity of a succinct rule would not be desirable. Although "clear and convincing evidence" is an ambiguous standard, the legal world is replete with other amorphous evidentiary standards. For example, in criminal trials the prosecutorial standard is proof "beyond a reasonable doubt." No fixed value or percentage of guilt exists, but this standard is generally successful for purposes of establishing criminal culpability. With regard to petitions for writ of habeas corpus and federal habeas corpus review alleging factual-based challenges, the "clear and convincing evidence" standard leads to varying results and therefore requires legal solution to remedy this problem.

37. See *Oliver*, 541 F.3d at 340-42. The court in *Oliver* stated:

While the facts before us regarding the jury's use of the Bible are perhaps more egregious than in these previous cases, the procedural posture here constrains our analysis. This is because here, the state court made a factual finding regarding the effect of the Bible on the jury, and we must defer to that factual finding unless Oliver presents 'clear and convincing' evidence to the contrary.

Id. at 342.

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C. How the Presumption of Correctness and the Ambiguous Evidentiary Standard for Rebuttal Deprive the Petitioner of a Fair Opportunity for Habeas Review

The presumption of correctness and the unclear “clear and convincing evidence” standard results in a fictitious opportunity for fair habeas review. Both the state court fact-finding procedure and the lack of a concise, consistent definition of clear and convincing evidence bind the hands of the habeas court. In broad terms, the phrase “clear and convincing evidence” means the evidence demonstrates that it is substantially more likely than not that the matter asserted is true.³⁸ However, it logically follows that a petitioner cannot meet this evidentiary standard if the trial court has previously entered a factual finding that definitively states that no constitutional error occurred and the court presumes this finding to be true. As a result of the combination of the presumption of correctness and ill-supported reasoning, the habeas court must concede a constitutional violation because it does not have the ability to correct the situation.

How can a petitioner succeed if the habeas court can acknowledge a state court’s unreasonable and poorly-articulated factual findings, but lacks the force to effectuate a cure? Unless new evidence is uncovered, the argument presented by the petitioner at the evidentiary hearing will be the same argument presented in the petition for writ of habeas corpus.³⁹ Even if a petitioner is able to present ancillary evidence that would further support his claim of a constitutional violation, the amount or quality of evidence that would warrant granting the petition is still unknown. These circumstances create a system in which state court factual findings are pivotal in habeas review of factual challenges alleging jury taint or bias.

38. Author’s synthesized definition of “clear and convincing evidence,” as derived from sources cited *supra* note 15.

39. See *Oliver*, 541 F.3d at 331, 333. *Oliver* first presented the argument that his jury improperly consulted the Bible during sentencing deliberations at the evidentiary hearing following trial. *Id.* at 331. The same argument sustained his petition for writ of habeas corpus. *Id.* at 333.

II. THE FAILURE OF HABEAS CORPUS REVIEW IN JURY BIAS CLAIMS

Although problems with habeas review arise in a wide range of circumstances, this Note focuses on habeas issues found in cases alleging jury bias. Petitions for habeas corpus often arise pursuant to fact-intensive Sixth Amendment challenges,⁴⁰ which commonly include the right be tried by a jury free from bias or prejudice.⁴¹ State court findings of fact are critical to such claims because information is often outside the defendant's firsthand knowledge, and is of the type that the prosecution is unwilling to provide and likely to dispute.⁴² Details of a criminal case are highly particularized and require close examination of fact-heavy issues in order to later resolve a constitutional error. Unfortunately, state fact-finding—particularly in post-conviction proceedings—often fails to satisfactorily explain the basis of the court's decision and falls short of providing well-reasoned rationale. The deficiency in the state court analysis is particularly troubling because factual findings limit the federal habeas court's ability to recognize the instances of injustice necessary to grant a petitioner's writ of habeas corpus.

Understanding the Sixth Amendment and a criminal defendant's right to an impartial jury is critical to federal habeas corpus review of jury bias. Fact-based constitutional challenges demonstrate the severity of ill-supported state court fact-finding related to jury prejudice when the judicial process reveals that jurors consulted the Bible during the trial or sentencing phase of deliberations. *Oliver v. Quarterman* provides an opportunity to examine, in-depth, federal habeas corpus review under such

40. See, e.g., *Giles v. California*, 128 S.Ct. 2678, 2693 (2008) (right to confront witnesses); *Crawford v. Washington*, 541 U.S. 36, 53–56 (2004) (same); *Doggett v. United States*, 505 U.S. 647, 654–58 (1992) (right to a speedy trial); *Barker v. Wingo*, 407 U.S. 514, 528–33 (1972) (same); *Williams v. Taylor*, 529 U.S. 362, 398–99 (2000) (ineffective assistance of counsel); *Delgado v. Lewis*, 223 F.3d 976, 981–82 (9th Cir. 2000) (same).

41. See, e.g., *Fields v. Brown*, 503 F.3d 755, 761 (9th Cir. 2007) (jury bias); *McNair v. Campbell*, 416 F.3d 1291, 1301–07 (11th Cir. 2005) (same); *Jones v. Kemp*, 706 F.Supp. 1534, 1549–50 (N.D.Ga. 1989) (same).

42. Conversation and events that transpire amongst jurors during jury deliberations are necessarily outside the defendant's firsthand knowledge. The defendant is not present for such dialogue and, although an evidentiary hearing can be called to shed some light on the discussions that took place during deliberation, he cannot compel complete disclosure. See FED. R. EVID. 606(b).

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circumstances.

A. The Right to an Impartial Jury

A criminal defendant's right to an impartial jury is one of the most revered rights protected under the Sixth Amendment of the Constitution of the United States.⁴³ Particularly in capital cases, the jury must hear a complete presentation of all aggravating⁴⁴ and mitigating⁴⁵ evidence. The jury must also objectively assess whether the prosecution demonstrated, beyond a reasonable doubt, that the defendant perpetrated the criminal act.⁴⁶ The jury then arrives at a conclusion based upon application of the law to the facts presented at trial.⁴⁷ Federal law clearly affirms the importance of preserving impartiality, particularly during capital cases.⁴⁸ Case law has established that "the jury should pass upon the case free from external causes

43. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

44. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); *United States v. Fields*, 483 F.3d 313, 325 (5th Cir. 2007) ("Nonstatutory aggravating factors may be considered by the jury in selecting an appropriate sentence once a defendant is found eligible for the death penalty, but they are not, and cannot be, used to determine that eligibility. . .").

45. *State v. DeCastro*, 467 S.E.2d 653, 666 (N.C. 1996). The court, citing the jury instruction given at trial, affirmed the instruction as a correct statement of the law:

A mitigating circumstance is a fact or a group of facts which do not constitute a justification or an excuse for a killing, nor reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing [or making it] less deserving of extreme punishment than other first degree murders, or making this defendant less deserving of the extreme punishment than other first degree murderers.

Id. (alteration in the original).

46. *In re Winship*, 397 U.S. 358, 361 (1970) ("[G]uilt of a criminal charge [must] be established by proof beyond a reasonable doubt.").

47. *See Turner v. Louisiana*, 379 U.S. 466, 472 (1965) ("The requirement that a jury's verdict 'must be based upon the evidence developed at trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.").

48. *Mattox v. United States*, 146 U.S. 140, 149 (1892) ("It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment.").

tending to disturb the exercise of deliberate and unbiased judgment.”⁴⁹

The judge has duties and limitations in securing an impartial jury, such as exerting vigilance over the proceedings⁵⁰ and investigating possible jury prejudice.⁵¹ Following the sentencing, the judge may conduct a hearing to assess the extent of possible influence on the jury.⁵² Federal Rule of Evidence (“FRE”) 606(b) governs this evidentiary hearing.⁵³ FRE 606(b) prohibits judicial inquiry of jurors’ mental processes during deliberations and forbids questioning related to any subject matter that influenced jurors’ decisions.⁵⁴ Jurors may, however, testify as to “whether extraneous prejudicial information was improperly brought to the jury’s attention” or “whether any outside influence was improperly brought to bear upon any juror”⁵⁵

The limitations of FRE 606(b) protect both the jurors and the verdict, and prevent the judge from invading the province of the jury.⁵⁶ Yet, a critical consequence of such limitations may be that the trial court cannot obtain an objective answer to the question of prejudice from the same individuals who face the

49. *Id.*

50. *See Remmer v. United States*, 347 U.S. 227, 228–30 (1954) (noting the failure of the trial court to investigate the impact of an F.B.I. investigation of a juror’s conduct, mid-trial, on that juror’s deliberations).

51. *See Oliver v. Quarterman*, 541 F.3d 329, 331–32 (5th Cir. 2008); *People v. Harlan*, 109 P.3d 616, 626–27 (Colo. 2005).

52. *See Oliver*, 541 F.3d at 342–43 (citing *Moody v. Johnson*, 139 F.3d 447, 483 (5th Cir. 1998)).

53. *See* FED. R. EVID. 606(b) (“[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.”).

54. FED. R. EVID. 606(b) states:

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.

Id.; *see also* FED. R. EVID. 606(b) advisory committee’s note (stating that restrictions on the questioning of jurors both shields them from annoyance and embarrassment, and protects the finality of verdicts).

55. FED. R. EVID. 606(b).

56. *See* advisory committee’s note accompanying FED. R. EVID. 606(b).

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allegation of bias.⁵⁷ Nevertheless, when post-sentencing juror testimony indicates the jury's decision was uninfluenced, the trial judge must make a factual finding to reflect that conclusion.⁵⁸

For a defendant whose habeas corpus petition alleges jury prejudice, the state court's factual determinations obstruct a petitioner's effort to prove denial of a Sixth Amendment right.⁵⁹ Denial of the petition effectively sanctions a possible constitutional violation without offering the petitioner or the habeas court a meaningful opportunity to explore the merits of the petitioner's claim. These issues are particularly clear in the specific context of jury bias based on Bible use. To date, courts remain split on whether the Bible constitutes an external influence on a jury.

B. Whether the Bible Constitutes an External Influence on a Jury

Federal courts of appeal have struggled to determine whether bringing the Bible into the deliberation room constitutes an external influence⁶⁰ on the jury. The Supreme Court has declined to answer the question of possible jury bias, turning down the opportunity to establish concrete guidelines for the lower courts.⁶¹ The Supreme Court's silence has

57. See Dean Sanderford, *The Sixth Amendment, Rule 606(b), and the Intrusion into Jury Deliberations of Religious Principles of Decision*, 74 TENN. L. REV. 167, 189–90 (2007). Sanderford argues:

Because a juror is categorically prohibited from testifying as to the basis of the jury's decision, the question of whether a Sixth Amendment violation has *actually occurred*—whether the jury actually decided the case on the basis of religious rather than legal principle—can *never* be answered using admissible evidence.

Id. at 190.

58. See *Oliver*, 541 F.3d at 332.

59. See *Oliver*, 541 F.3d at 342–43 (“A state court's post-trial factual finding regarding a juror's impartiality is entitled to a ‘presumption of correctness.’”).

60. *Tanner v. United States*, 483 U.S. 107, 123 (1987). An “internal” influence on the jury includes physical and mental incompetence due to disease or intoxication. See *id.* An “external” influence on the jury includes acts such as reading newspaper, articles not admitted into evidence, or participating in conversations with independent parties about the trial. *Id.*

61. See *Petition for Writ of Certiorari, Lucero v. Texas*, No. 07-1429, 2008 WL 2095731, at *i (May 13, 2008) (cert denied). Lucero's petition for writ of certiorari presented the Supreme Court of the United States with two questions:

(1) Are a defendant's Sixth Amendment rights violated where (i) the jury secretly brings a Bible into the jury deliberation room for

consequently generated a mixed body of precedent.⁶² As a result, a split in the federal circuits exists concerning how to proceed when jurors admit to the presence and consultation of specific Bible passages during sentencing deliberations.⁶³

Lack of clarity in the law often results in poorly-reasoned fact-finding, which prejudicially affects both the state court proceedings and federal habeas review, and undercuts the integrity upon which habeas review rests. The following cases illustrate the uncertainty regarding whether the Bible constitutes an external influence on a jury.

1. Group Consultation of the Physical Text of the Bible During Deliberations Constitutes Jury Misconduct; Personal Consultation Does Not

In *Jones v. Kemp*, a Georgia trial court granted a juror's request to use the Bible during deliberations for capital murder.⁶⁴ On habeas review, the district court found the state court's explicit authorization of the use of the Bible was in error.⁶⁵ The district court analogized the Bible to other legal or

assistance in deciding on a verdict in a capital case; and (ii) the jury foreman reads passages of the Bible in an attempt to persuade hold-out jurors to impose a sentence of death? (2) Did the Texas Court of Criminal Appeals err in relying on after-the-fact affidavits of jurors about the effect of the Bible on their deliberations as the basis for finding introduction of the Bible into the jury room to be "harmless error?"

Id.

62. Compare *People v. Harlan*, 109 P.3d 616, 632 (Colo. 2005) (holding use of the Bible during jury deliberations constituted a constitutional error), and *Jones v. Kemp*, 706 F.Supp. 1534, 1560 (N.D.Ga. 1989) (same), with *Oliver v. Quarterman*, 541 F.3d 329, 332 (5th Cir. 2008) (holding that use of the Bible during jury deliberations did not result in a prejudicial, constitutional error), *Fields v. Brown*, 503 F.3d 755, 761 (9th Cir. 2007) (same), *Robinson v. Polk*, 438 F.3d 350, 368 (4th Cir. 2006) (same), and *McNair v. Campbell*, 416 F.3d 1291, 1295 (11th Cir. 2005) (same).

63. Compare *People v. Harlan*, 109 P.3d 616, 632 (Colo. 2005) (holding use of the Bible during jury deliberations constituted a constitutional error), and *Jones v. Kemp*, 706 F.Supp. 1534, 1560 (N.D.Ga. 1989) (same), with *Oliver v. Quarterman*, 541 F.3d 329, 332 (5th Cir. 2008) (holding that use of the Bible during jury deliberations did not result in a prejudicial, constitutional error), *Fields v. Brown*, 503 F.3d 755, 761 (9th Cir. 2007) (same), *Robinson v. Polk*, 438 F.3d 350, 368 (4th Cir. 2006) (same), and *McNair v. Campbell*, 416 F.3d 1291, 1295 (11th Cir. 2005) (same).

64. 706 F.Supp. 1534, 1558 (N.D.Ga. 1989).

65. *Id.* at 1560 ("In sum, it was a constitutional error for the court to permit the Christian Bible to go into the jury room at the request of the jurors

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quasi-legal texts and held that “[t]o the average juror, Webster’s Dictionary may be no more than a reference book, and The Reader’s Digest nothing more than a diverting periodical; but the Bible is an authoritative religious document and is different not just in degree, although this difference is pronounced, but in kind.”⁶⁶ The district court appeared to take a steadfast position that, when determining the guilt or innocence of the defendant charged, the jury may not use or rely upon any material not received into evidence.⁶⁷ However, the court also stated that a juror need not disregard his or her personal faith entirely.⁶⁸ The court, therefore, held that during deliberations personal use of the Bible is permissible but group use is not.⁶⁹ The district court did not address the specific content of the Biblical passages, instead finding error simply because the jurors discussed the Bible during deliberations.⁷⁰

2. *Any Consultation of the Bible During Deliberations Constitutes Jury Misconduct*

In *People v. Harlan*, the Colorado Supreme Court affirmed the trial court’s finding that a jury improperly consulted the

apparently for consultation in connection with their deliberations.”).

66. *Id.* at 1559.

67. *See id.* at 1560. The court stated:

Extraneous materials, whether they be dictionaries, law books, or Bibles, unless properly received in evidence, are not allowed in the jury room for use by a deliberating jury. The jury should have with it in the jury room *only* those documents received in evidence, or perhaps judicially noticed and a copy of the court’s charge if reduced to writing—nothing else.

Id.

68. *Id.* (“The court in no way means to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen.”); *see also* *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.”).

69. *Jones*, 706 F.Supp. at 1560.

70. *Id.* at 1559–60. The court stated that:

How the jurors used the Bible, whether as a silent monitor witnessing that the jurors approached their solemn task in the proper attitude, or for guidance as to their specific task, the Court cannot ascertain. A search for the command of extrajudicial ‘law’ from any source other than the trial judge, no matter how well intentioned, is not permitted.

Id. at 1559.

Bible during the sentencing phase of a capital trial.⁷¹ On post-conviction review, the Colorado Supreme Court upheld the trial court's decision to vacate the death sentence and imposed a sentence of life without the possibility of parole.⁷² The jury specifically read and discussed *Leviticus* 24:20–21 and *Romans* 13:1, passages that command the death penalty for murder.⁷³ Thirteen years later, following Colorado Rule of Evidence (“CRE”) 606(b), the trial court questioned several jurors at an evidentiary hearing to confirm that use of the Bible occurred.⁷⁴ Based on testimony elicited at the hearing, the trial court made several factual findings.⁷⁵ The court found that jurors inappropriately consulted the Bible, took notes on Biblical passages outside the courtroom, used the notes during deliberations, and discussed the passages commanding the death penalty prior to sentencing.⁷⁶ The Colorado Supreme Court acknowledged that a juror's personal beliefs or spiritual upbringing influence deliberations.⁷⁷ The court held, however, that the jury may not consult the physical text of the Bible while deliberating.⁷⁸ The court explained that “[t]he written word persuasively conveys the authentic ring of reliable authority in a way the recollected spoken word does not.”⁷⁹ The court concluded that the jury may consider only the facts and law instructed by the court.⁸⁰

71. See 109 P.3d 616, 634 (Colo. 2005).

72. *Id.*

73. *Id.* at 622. *Leviticus* 24:20–21 reads: “Fracture for fracture, eye for eye, tooth for tooth, as he has caused disfigurement of a man, so shall it be done to him. And whoever kills an animal shall restore it, but whoever kills a man shall be put to death.” (New Scofield Study Version). *Romans* 13:1 reads: “Let every soul be subject to the governing authorities for there is no authority except from God and the authorities that exist are appointed by God.” (New Scofield Study Version).

74. *Harlan*, 109 P.3d at 626. Colorado adopted the Federal Rules of Evidence (FRE), including FRE 606(b). See CRE 606(b) advisory committee note; see also *Stewart v. Rice*, 47 P.3d 316, 321 (Colo. 2002) (noting that Colorado adopted CRE 606(b) in 1980 which is “substantially similar to its federal counterpart.”).

75. See *Harlan*, 109 P.3d at 628–29.

76. *Id.* at 629.

77. *Id.* at 632.

78. See *id.*

79. *Id.*

80. See *id.*

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3. *Consultation of Benign Biblical Passages During Deliberations Constitutes Harmless Error*

In *McNair v. Campbell*, the Eleventh Circuit held that a jury improperly consulted the Bible during deliberations.⁸¹ However, the court also held that when the jury foreperson read *Psalms* 121 and *Luke* 6:37, the passages did not influence the jury.⁸² The court rested its decision on the benign content of the specific passages, acknowledging the trial court's holding that "[n]either of these scriptures contain [sic] material which would encourage jurors to find a defendant guilty or to recommend the death penalty."⁸³ The generality of the Biblical passage content was also critical to the state court of appeals. The court stated that "prayers and scripture readings in the jury room were intended to encourage . . . the jurors to take their obligation seriously and to decide the question of guilt or innocence based only on the evidence presented from the witness stand in open court."⁸⁴ Because the substance of the passages did not propound the death sentence or spur the jury to assign guilt, the Eleventh Circuit deemed the jury's use of the Bible harmless.⁸⁵

4. *The Meaning of a Biblical Passage is Irrelevant in a Harmless Error Determination*

In *Robinson v. Polk*, the Fourth Circuit denied a request for an evidentiary hearing and held that although the jury consulted the Bible during deliberations—including the "eye for an eye" passage—the effect on the defendant was not prejudicial.⁸⁶ The circuit court stated that "no Biblical passage . . . had any evidentiary relevance to the jury's determination of the existence

81. See 416 F.3d 1291, 1308 (11th Cir. 2005) ("[I]t is undisputed that jurors in the guilt phase of McNair's trial considered extrinsic evidence during their deliberations . . .").

82. See *id.* at 1308–09 ("[T]he extraneous material, i.e., reading from the Bible and praying in the jury room during deliberations, was not of such a character or nature as to indicate bias or corruption or misconduct that might have affected the verdict.").

83. *Id.* at 1308 (citing *McNair v. State*, 706 So. 2d 828, 837 (Ala. 1997)). *Luke* 6:37 reads: "Judge not, and ye shall not be judged; condemn not and ye shall not be condemned; forgive, and ye shall be forgiven . . ."

84. *McNair*, 416 F.3d at 1308.

85. See *id.* at 1309.

86. See 438 F.3d 350, 363–64, 366 (4th Cir. 2006).

of these aggravating and mitigating circumstances.”⁸⁷ Like the Eleventh Circuit, the Fourth Circuit found the meaning of the passage irrelevant in finding that no error occurred.

The Fourth Circuit went as far as to state that “reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence.”⁸⁸ The court stated that “[j]urors are not expected to come into the jury box and leave behind all that their human experience has taught them.”⁸⁹ The Fourth Circuit suggested that even if the specific passage *had* encouraged the jurors to find the defendant guilty, the commonplace presence of the Bible in society distinguishes it from other sources of influence.⁹⁰

The Ninth Circuit confronted the same question of jury misconduct in *Fields v. Brown*, after learning that a jury foreperson consulted the Bible at home and brought his notes to the sentencing deliberations.⁹¹ The notes included a list of Biblical “pros” and “cons” supporting the death penalty which were reviewed during sentencing deliberations.⁹² The jurors shared the list which contained numerous passages—some transcribed verbatim—specifically favoring capital punishment.⁹³ Only a handful of the quoted lines disfavored capital punishment.⁹⁴ The court ultimately held that the Biblical

87. *Id.* at 363.

88. *Id.* at 364.

89. *Id.* at 364 (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O’Connor, J., concurring)).

90. *See id.* at 363–64. “[T]he reading of Bible passages invites the listener to examine his or her own conscience from within. In this way, the Bible is not an ‘external’ influence.” *Id.*

91. 503 F.3d 755, 777 (9th Cir. 2007).

92. *Id.* at 777–78.

93. *Id.* at 777 n.15–16, 777–78.

94. *Id.* at 777 n.15, 784.

On sheer numbers alone, White’s Bible references in favor of the death penalty had at least thirteen separate entries, with over thirty-one lines of writing and several lengthy direct quotations from the Bible, including one quotation of thirteen lines of verse. Conversely, the ‘con’ side had no Bible quotations and a mere six entries on six written lines. Additionally, the ‘con’ list was comprised of piecemeal ideas and thoughts, whereas the ‘pro’ death penalty contains numerous references to higher law from the Bible such as an ‘eye for eye’ and ‘[l]et everyone be subject to the higher authorities, for there exists no authority except from God.’

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references did not influence the jury because it is a universal cultural fixture and contains well-known themes that both support and oppose the death penalty.⁹⁵

Judge Gould of the Ninth Circuit strongly dissented, arguing that the majority's rationale that the Bible qualifies as "a notion of general currency" is flawed in two ways.⁹⁶ First, the foreman needed to consult the text in order to recall the applicable "pros" and "cons" precisely because the information was not common knowledge.⁹⁷ Second, the sheer volume of text lifted from the Bible and brought to deliberations exceeds a lay person's common Biblical knowledge.⁹⁸ Judge Gould's dissent is persuasive in suggesting that specific Biblical instruction is not often readily stored in society's collective knowledge bank. Furthermore, his dissent indicates division within the Ninth Circuit on the issue of whether a jury's use of the Bible during the sentencing phase of deliberations prejudices the defendant.

These cases demonstrate the incongruous results produced when there is a lack of consensus on a matter of law. In some instances, the habeas court found that the specific manner of referencing the Bible did not result in improper use. In the absence of jury misconduct or bias, the petitioner was denied relief and no further inquiry was required.⁹⁹ In another instance, the habeas court found that while use of the Bible was improper, the effect on the petitioner was a harmless error.¹⁰⁰ In a third instance, the habeas court found that use of the Bible improperly influenced the jury and granted the petition for writ of habeas corpus.¹⁰¹

Without a clear, bright-line rule that indicates how the

Id. at 784.

95. *Id.* at 780 ("It is difficult to see how sharing notes can be constitutionally infirm if sharing memory isn't.").

96. *See id.* at 784 (Gould, J., dissenting).

97. *Id.* ("It is one thing to say something is common knowledge when a person recites it from memory, but it is quite a different thing altogether to argue that a Bible verse is common knowledge when a person has to research the Bible, and write down text to remember it.").

98. *Id.* at 784–85 ("[I]t is unlikely that for many persons seventeen lines of biblical text, and indeed thirteen consecutive lines from one quote, can be viewed as a 'notion of general currency.'").

99. *See Robinson v. Polk*, 438 F.3d 350, 363–64, 366 (4th Cir. 2006).

100. *See McNair v. Campbell*, 416 F.3d 1291, 1308–09 (11th Cir. 2005).

101. *See Jones v. Kemp*, 706 F.Supp. 1534, 1560, 1565 (N.D.Ga. 1989).

lower courts should proceed, an improved fact-finding process should be adopted to ensure better protection of a defendant's constitutional rights. Whether the use of the Bible constitutes an improper external influence on a jury remains an extremely fact-intensive question. There is no federal law that holds that a jury may not consult the Bible during the sentencing phase of a trial. Because there is no controlling federal precedent on this issue, well-reasoned state court factual findings are the only safeguard for a criminal defendant in pursuit of a writ of habeas corpus.

At present, state fact-finding is inadequate because it is often ill-supported or unreasonable given the highly individualized and unique factual circumstances of each criminal case. Factual determinations are binding on federal habeas review regardless of whether the state court has elucidated its decision for entering the finding of fact. These factual findings ultimately set the boundaries of inquiry for the federal habeas court and restrict the habeas court's ability to address the fact-finding problem just described.¹⁰² *Oliver v. Quarterman* illustrates these issues.

C. *The Specter of Factual Findings: Oliver v. Quarterman*

In 1998,¹⁰³ Khristian Oliver killed Joe Collins after Collins discovered Oliver burglarizing his home.¹⁰⁴ After Oliver shot Collins, he struck Collins in the head with the butt of his rifle.¹⁰⁵ Oliver was convicted of capital murder and sentenced to death.¹⁰⁶

Oliver subsequently filed a motion for a new sentencing trial, alleging that the jurors improperly consulted the Bible during sentencing.¹⁰⁷ Four jurors testified at the state court evidentiary hearing that a juror read the Bible aloud to a small

102. See 28 U.S.C. § 2254(e)(1) (2006) ("In a proceeding instituted by an applicant for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.").

103. *Oliver v. Quarterman*, 254 Fed. App'x 381, 383 (5th Cir. 2007) (per curiam).

104. *Oliver v. Quarterman*, 541 F.3d 329, 331 (5th Cir. 2008).

105. *Id.*

106. *Id.*

107. *Id.*

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group of jurors in the room.¹⁰⁸ One juror testified that a specific verse was discussed that mentioned “who is a murderer and who should be put to death.”¹⁰⁹ Another testified that the read passage stated “if a man strikes someone with an iron object so that he dies, then he is a murderer and should be put to death.”¹¹⁰ Testimony revealed conflicting accounts about when referencing of the Bible took place. One juror testified that the jury consulted the Biblical passage before deciding on the appropriate punishment, while another testified that the jury consulted the Bible only after deciding to impose the death sentence.¹¹¹ Following the hearing, the trial court entered a finding that no jury misconduct occurred.¹¹²

The Texas Court of Criminal Appeals affirmed Oliver’s conviction and death sentence,¹¹³ and the United States Supreme Court denied his petition for writ of certiorari.¹¹⁴ Thereafter, the appellate court denied his post-conviction request for relief¹¹⁵ and, again, the Supreme Court denied his petition for certiorari to review the state habeas proceeding.¹¹⁶ In 2004, Oliver filed a petition for writ of habeas corpus with the federal district court.¹¹⁷

In reviewing Oliver’s petition for habeas corpus, the Fifth Circuit recognized the jury’s consultation of the Bible was “even

108. *Id.* at 331–32.

109. *Id.*

110. *Id.* at 332. *Numbers* 35:16 (King James) reads: “And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death.”

111. *Oliver*, 541 F.3d at 332–33.

112. *See id.* at 332. The court stated:

[A] conscientious, dedicated and carrying [sic] jury considered this case in accord with the Court’s Charge and the instructions of the Court and rendered their verdict in accord with the evidence they heard in this case uninfluenced by any outside influence of any kind shown to the Court in this hearing.

Id.

113. *Oliver v. State*, No. 73, 837 (Tex. Crim. App. April 17, 2002) (per curiam) (unpublished).

114. *Oliver v. Texas*, 537 U.S. 1161 (2003).

115. *Oliver*, 541 F.3d at 332–33.

116. *Oliver v. Texas*, 538 U.S. 1001 (2003).

117. *Oliver v. Quarterman*, 254 Fed. App’x 381, 383 (5th Cir. 2007) (per curiam).

more egregious than those in previous cases.”¹¹⁸ However, it found that the Bible reading was not prejudicial and denied the petition because of the state court’s factual finding that jury bias did not occur.¹¹⁹ The Fifth Circuit acknowledged that although Oliver argued that the Bible passages may have influenced the jury’s sentencing deliberations, he failed to present “clear and convincing evidence” to rebut the presumption of correctness given to the state court’s factual finding.¹²⁰ Although Oliver did not present clear and convincing evidence to rebut the state court’s findings, the Fifth Circuit offered no commentary on how Oliver could have satisfied this burden.¹²¹

Overall, the court’s holding implied that the jury’s consultation of the Bible was highly improper. The court’s mere affirmation of the finding of fact, without access to the reasoning behind it, illustrates the need for modification of the current federal habeas corpus standard of review. This need is particularly apparent in the court’s analysis of newly discovered evidence and of factors supporting the state court finding that use of the Bible had no influence on the jury.

1. The Fifth Circuit was Unable to Consider Newly Discovered Evidence Due to Oliver’s Inability to Preserve Evidence on the Record

After trial, Oliver acquired new information about the jury’s deliberations.¹²² The Fifth Circuit, however, did not consider this new evidence.¹²³ Oliver submitted a transcript of an interview between a juror, Michael Brenneisen, who did not testify at the evidentiary hearing, and a foreign journalist, Egon

118. *Oliver v. Quarterman*, 541 F.3d 329, 339–40 (5th Cir. 2008).

119. *See id.* at 342–43. A hearing followed the sentencing where four jurors testified to the presence and use of the Bible during deliberations but stated that the content of passages did not influence them; the state court concluded that no prejudice occurred based upon the jurors’ testimony. *Id.* at 331–32.

120. *Id.* at 343.

121. *See id.* at 343–44.

122. *Id.* at 333.

123. The court noted:

We present the information contained in Brenneisen’s interview merely as background. As Oliver did not submit this evidence to the state court and therefore did not ‘develop the factual basis of [his] claim in State court proceedings,’ we do not consider the interview as substantive evidence in reaching our decision.

Id. at 333, n.6 (alteration in original).

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Clausen.¹²⁴ The transcript indicated that Brenneisen “remembered asking himself, ‘is this the way the Lord would decide the case?’”¹²⁵ Brenneisen also told Clausen that “if civil law and Biblical law conflict, then the Biblical law is paramount.”¹²⁶ Despite the newfound evidence, the district court denied Oliver’s petition for writ of habeas corpus.¹²⁷

On review, the Fifth Circuit stated that because Oliver had declined to submit this evidence to the state court, the Fifth Circuit would not consider the interview in reaching its decision.¹²⁸ In fact, Oliver did attempt to submit the newly discovered evidence to the district court.¹²⁹ Oliver filed a motion to stay the federal proceeding until he could secure a hearing in state court to develop the new evidence, but the court denied his request.¹³⁰ The fact that the evidence was newly discovered necessarily implies that, despite due diligence, Oliver did not have access to the information beforehand. Thus, Oliver had no way to preserve evidence derived from the transcript in the record.

Under existing federal habeas corpus law, the district court’s justification for refusing to consider the newly discovered evidence is illogical. The court expected Oliver to perform the impossible. The likelihood that a petitioner challenging the constitutionality of a death sentence would omit, even negligently, such crucial evidence during the state court proceedings is very small. Without measures that improve review of the fact-finding process, the district court does not have a way to compel the state court to consider all relevant evidence—including newly discovered evidence—that may assist in a petitioner’s defense. As a result, the Fifth Circuit declined Oliver’s newly discovered evidence pursuant to the federal

124. *Id.* at 333.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 333, n.6 (“As Oliver did not submit this evidence to the state court and therefore did not ‘develop the factual basis of [his] claim in State court proceedings,’ we do not consider the interview as substantive evidence in reaching our decision.”) (alteration in original).

129. *Oliver v. Quarterman*, 254 Fed. App’x 381, 389–90 (5th Cir. 2007) (per curiam).

130. *Id.* at 389.

habeas statute.¹³¹

2. *Comporting with State Court Findings of Fact*

In *Oliver*, the Fifth Circuit stated that “[a]lthough the record includes evidence that cuts both ways, given the highly deferential standard of habeas review, we conclude that at least four factors provide ‘fair support in the record’ for the state court’s finding.”¹³² The Fifth Circuit’s analysis is not unreasonable in light of current habeas law. However, the aforementioned quote implies that, while the Fifth Circuit desired to reach a just result, the guidelines set forth in the federal habeas statute stymied the court’s decision. *Oliver* illustrates the fundamental incongruence between the objectives of habeas corpus review and the statutory requisite that even ill-supported state court factual findings are binding on federal habeas courts. Accordingly, the Fifth Circuit offered four poorly-articulated justifications for comporting with the state court’s finding that the jury’s reference to the Bible or its specific, instructive passages did not result in jury bias.

First, the court held that there was “contradictory evidence regarding whether the jurors’ consultation of the Bible occurred before or after the jury reached its decision.”¹³³ The Fifth Circuit did not offer a rationale for why this uncertainty supports a conclusion that consultation of specific Biblical passages did not influence *Oliver*’s jury. This single statement leads one to infer that any degree of uncertainty weighs in favor of deferring to the state court’s conclusion.

Second, the court found it relevant that “several jurors testified that the Bible was not the focus of their discussions.”¹³⁴ This statement implies that the *degree* to which the Bible is

131. *Id.* at 390; *see also* 28 U.S.C. § 2254(e)(2)(a)–(e)(2)(b) (2000):

[T]he court shall not hold an evidentiary hearing on the claim unless the applicant shows that the claim relies on . . . (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2)(a)–(e)(2)(b).

132. *Oliver*, 541 F.3d at 343.

133. *Id.*

134. *Id.*

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consulted matters. Perhaps the Fifth Circuit means to suggest that the Bible cannot be the primary focus of deliberations, but some focus on the Bible and factually-significant passages is permissible. The Fifth Circuit did not present an explanation for why it found this aspect persuasive in supporting the state court's factual finding that no prejudice occurred during the sentencing phase of deliberations.

Third, the court recognized that the jurors received instructions "not to refer to or discuss any matter or issue not in evidence before [them]" and that they were "bound to receive the law from the Court."¹³⁵ The Fifth Circuit must believe that jury instructions that warn against consulting or referencing additional sources and materials mitigate any risk of jury taint or bias. Curiously, the court discretely stated that this third factor "also cuts against the state's argument in that the jurors disobeyed the court's instructions by consulting the Bible, which potentially tainted the jury's decision."¹³⁶ The Fifth Circuit's contradictory statements undermine the argument that the jury instructions were sufficient to protect Oliver from prejudice, particularly because jurors read the Biblical passages after the court gave its instructions.

Fourth, the court found that "the jurors brought the Bibles into the jury room by themselves and without the imprimatur of the court."¹³⁷ This is the most offensive and implausible justification for aligning with the state court's factual finding that the jury's use of the Bible constituted harmless error. To assert that jurors' use of personal Bibles during deliberation without the permission of the court renders the Bible's effect on the outcome of the verdict harmless is absurd. This finding, sanctioned by the Fifth Circuit, casts a dangerously wide net of protection over juror conduct that occurs without prompting or approval of the state court. Unfortunately, the immediate consequence is that the petitioner must meet another heightened hurdle in order to seek redress for possible violation of a constitutional right.

135. *Id.*

136. *Id.* at 343, n.18 ("This fact also calls into question the [state] court's statement that the jurors 'considered this case in accord with the Court's Charge and the instructions of the Court'").

137. *Id.* at 343.

The Fifth Circuit's decision in *Oliver v. Quarterman* has far-reaching adverse effects on federal habeas corpus litigation. Not only did the outcome frustrate Oliver's own petition, but it also discourages future petitions for writ of habeas corpus by failing to explain what evidence could rebut the presumption of correctness afforded to state court factual findings. The reasoning proffered by the Fifth Circuit in support of its finding—that the trial court correctly held that the jury's use of the Bible did not prejudice Oliver's criminal trial—is facially weak.

The tone of the opinion is also, at times, inconsistent.¹³⁸ The court acknowledged that the facts in *Oliver v. Quarterman* were “more egregious than those in previous cases,”¹³⁹ yet presented feeble argument for finding that the trial court appropriately found no prejudice.¹⁴⁰ The court admitted that the jury improperly consulted the Bible during deliberations,¹⁴¹ yet found Oliver did not rebut the state court's factual finding that the jury's use of the Bible did not prejudice its decision.¹⁴² This contraposition is the product of trial court fact-finding that effectively eliminates all power vested in the habeas court to remedy infringement of constitutionally protected rights. As a result, the rationale appears to contradict the tenor of the Fifth Circuit's true desire as it perpetuates the injustice inflicted upon Oliver.¹⁴³

Any additional statements made by the Fifth Circuit could have served as critical guidance for a petitioner seeking an

138. *Id.* at 343, n.18 (“This fact also calls into question the [state] court's statement that the jurors ‘considered this case in accord with the Court's Charge and the instructions of the Court . . .’”).

139. *Oliver*, 541 F.3d at 342.

140. *See id.* at 343.

141. *Id.* at 340 (“As such, we hold that the jury's consultation of the Bible passages in question during the sentencing phase of the trial amounted to an external influence on the jury's deliberations.”).

142. *Id.* at 343.

143. The Fifth Circuit stated:

Here, we face facts that are even more egregious than in those previous cases, as the jurors consulted a specific passage that provided guidance on the appropriate punishment for this particular method of murder. As such, we hold that the jury's consultation of the Bible passages in question during the sentencing phase of the trial amounted to an external influence on the jury's deliberations.

Id. at 339–40.

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indication of what a federal habeas court requires to recognize a possible constitutional violation. A habeas court need not give protracted rationale in support of its findings.¹⁴⁴ Some explanation, however, would establish precedence to which future petitioners could refer. The Fifth Circuit's truncated opinion does little to assist future petitioners seeking a writ of habeas corpus on constitutional grounds, who allege the loss of the right to an impartial jury.

The use of the Bible during a legal proceeding risks the jury elevating God's law above the laws of the United States. The Constitution protects the criminal defendant's right to an impartial jury.¹⁴⁵ The jury's use of the Bible, however, exposes the defendant to a moral code different from the supreme law of the land. As a result, the defendant's Sixth Amendment guarantee to an unbiased jury is threatened. This right demands that the federal habeas corpus standard of review include the power to recognize insufficient justification of a state court's factual finding that the Bible did not prejudicially influence the jury. If the jurors openly defied federal law to rely on the Bible, no one would question that a Sixth Amendment violation occurred. The federal habeas court, however, needs access to the relevant facts to reach such a conclusion.

Findings of fact are not the only troublesome aspect of federal habeas corpus law. Solutions that resolve similar issues in habeas law provide instruction on how to address inadequate state court factual findings. A model proposed to resolve problems related to federal habeas review of findings of law is particularly valuable in constructing a fact-finding remedy.

III. THE REASONING-PROCESS REVIEW MODEL: RESOLVING QUESTIONS OF LAW ON FEDERAL HABEAS CORPUS REVIEW

In response to conflicting decisions relating to conclusions of law in federal habeas proceedings, Professor Steven Semeraro

144. *See* 28 U.S.C. § 2254. This section governs federal habeas proceedings but no subsection specifically requires the habeas court to give a detailed explanation of its findings.

145. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

proposed a modification to federal habeas corpus through his reasoning-process review model.¹⁴⁶ This model addresses how federal habeas courts struggle to give adequate deference to state court decisions while ensuring that state courts appropriately apply federal law.¹⁴⁷

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)¹⁴⁸ provides the language that governs modern day habeas corpus petitions.¹⁴⁹ Under the AEDPA, the habeas court is bound to use an “objective reasonableness” standard when reviewing legal findings of the state court.¹⁵⁰ The objective reasonableness standard is satisfied “[a]s long as objectively reasonable jurists could debate the issue.”¹⁵¹ Thus, there are instances where the federal habeas court would grant a writ on de novo review, but must deny the petition solely because the state court’s decision harbored some degree of reasonableness.¹⁵² This standard confuses and undermines the intent of the AEDPA’s reasonable application of federal law. As a result, “[d]eference . . . turns not on the reasonableness of the state’s analysis, as Congress intended, but on the federal court’s subjective assessment of the merits of the state court’s result.”¹⁵³

Neither expanding nor narrowing the current guidelines imposed on habeas courts sufficiently clarifies the vagueness of the objective reasonableness standard.¹⁵⁴ Instead, the reasoning-

146. Semeraro, *supra* note 20, at 900.

147. *Id.* at 929.

148. Title 28 U.S.C. § 2254 codified the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

149. See Semeraro, *supra* note 20, at 897–88 n.4. Professor Semeraro states that with regard to “pure questions of fact, the 1996 Act . . . permitted a federal habeas court to grant the writ when the state court unreasonably determined ‘the facts in light of the evidence presented in the State court proceeding.’” *Id.*

150. *Id.* at 905 (citing *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (“A federal court may not overrule a state court for simply holding a view different from its own, when the precedent for this Court is, at best, ambiguous.”)).

151. *Id.* at 898.

152. *See id.*

153. *Id.* at 899.

154. *See generally id.* at 906–923. Professor Semeraro observes:

The arguments on each side of the breadth-of-review debate are significant but ultimately not decisive or compelling. The costs of broad federal habeas are potentially profound, but too general to yield firm conclusions. . . . Based on the available evidence, the risk that strict federal review would retard state processes seems potentially as great as the risk that narrower review would weaken state processes.

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process review model replaces the objective reasoning standard with a more objective two-step test.¹⁵⁵ First, the habeas court must assess whether the lower court cited all applicable federal law.¹⁵⁶ Second, the habeas court must determine whether the lower court articulated a thorough understanding of federal law based on the written opinion.¹⁵⁷ The reasoning-process review model ensures that the state courts have given thorough and adequate consideration to relevant federal law.¹⁵⁸ When a state court actively engages in applying federal law and expresses the reasoning behind such application, deference to the state court's decision is preserved and the tenants of the ADEPA are upheld.¹⁵⁹

The federal habeas corpus standard of review scrutinizes the state court's application and interpretation of all relevant federal law.¹⁶⁰ Title 28 U.S.C. § 2254 denies a petition for writ of habeas corpus unless the state court misinterpreted or unreasonably applied federal law, or rendered an unreasonable decision given the evidence presented at trial.¹⁶¹ As applied to questions of law, the reasoning-process review model permits the federal habeas court to determine whether the state court cited all relevant federal law.¹⁶² The model also requires the federal habeas court to determine if the state court supported its decision with sufficient clarity and with a rational interpretation of federal law.¹⁶³ If the reasoning-process review model is satisfied, the state court's decision stands.¹⁶⁴ If the reasoning-process review model is not satisfied, the habeas court returns the decision to the state court with suggestions to guide the state court's reassessment of questions of law.¹⁶⁵

To ensure adequate fact-finding necessary to assess jury bias

Id. at 923.

155. *See id.* at 927–28.

156. *Id.*

157. *Id.* at 928.

158. *See id.* at 926–27.

159. *See id.*

160. *See* 28 U.S.C. § 2254(d)(1)–(d)(2) (2000).

161. *Id.*

162. Semeraro, *supra* note 20, at 927–28.

163. *Id.* at 928.

164. *See id.* at 927.

165. *Id.*

and prejudice claims, this Note proposes revising and extending the reasoning-process review model to apply to state court findings of fact.

IV. HOW AND WHY THE FACT-FINDING PROCESS REVIEW MODEL SHOULD APPLY TO FACUTAL FINDINGS ON FEDERAL HABEAS CORPUS REVIEW

The absence of an effective method for holding state courts accountable for poorly-articulated or poorly-reasoned factual findings produce results like those found in *Oliver v. Quarterman*. A new review model that requires state courts to articulate evidentiary support for factual findings would protect the constitutional rights of petitioners, like Oliver, who would not otherwise receive a realistic opportunity for fair review under federal habeas corpus law.

This Note proposes that the reasoning-process review model methodology developed for questions of law should apply to findings of fact. Hereinafter, the fact-finding process review model refers to the application of this process to findings of fact. The fact-finding process review model requires state courts to provide sufficient justification for factual findings. When state court factual findings are poorly-articulated or supported, the habeas court has the power to identify the weaknesses in the rationale and direct the case back to the state court for further assessment.¹⁶⁶

Application of the fact-finding model to *Oliver v. Quarterman* demonstrates how the model functions effectively in the real world. The fact-finding process review model improves oversight and accountability of state court determinations without disturbing the limits of habeas corpus review. Overall, the fact-finding model modifies current fact-based constitutional review to fulfill the intended purpose of federal habeas corpus—to provide the petitioner with a fair opportunity to challenge his confinement.

A. A Practical Application of the Fact-Finding Process Review Model: Oliver v. Quarterman

In *Oliver v. Quarterman*, poorly-articulated and poorly-

166. See discussion *infra* Part IV.B.

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reasoned factual findings resulted in the deprivation of a fair opportunity for habeas review. Application of the fact-finding process review model to this case demonstrates how the model resolves this issue.

Following an evidentiary hearing, the trial court made the factual finding that the jury's use and consultation of the Bible during the sentencing phase of deliberations did not prejudicially affect Oliver's conviction and sentence.¹⁶⁷ The appellate court affirmed the trial court's decision.¹⁶⁸ Both the trial court's analysis and the appellate court's affirmation of the decision fail the fact-finding process review model because the reasoning provided by each court does not satisfactorily explain the factual determinations.

1. Defeat of Trial Court Findings

After entering judgment against the defendant, the trial court concluded that the jury's use of the Bible during deliberations did not infringe on Oliver's Sixth Amendment rights.¹⁶⁹ At an evidentiary hearing, Oliver called four different jurors to testify to the presence of the Bible at his trial.¹⁷⁰ One juror, Kenneth McHaney, testified that another juror read from the Bible to a small group of jurors during deliberations.¹⁷¹ McHaney testified that a fellow juror informed him that there was a passage in the Bible that referenced certain acts and the appropriate punishment for those acts.¹⁷² McHaney then asked that juror for permission to read her Bible and the specific passage she mentioned.¹⁷³ McHaney testified that he read the commandment "thou shalt not kill" and the passage that describes "who is a murderer and who deserves a death sentence."¹⁷⁴

Two other jurors testified as well. One stated that he had not read from any Bible but witnessed those who had.¹⁷⁵

167. *See* Oliver v. Quarterman, 541 F.3d 329, 332 (5th Cir. 2008).

168. *Id.* at 332–33.

169. *See id.* at 332.

170. *Id.* at 331.

171. *Id.*

172. *Id.* at 331–32.

173. *Id.* at 332.

174. *Id.*

175. *Id.*

Another stated that she recalled seeing multiple Bibles in the deliberation room and that several jurors consulted the Bible after the jury had reached its decision.¹⁷⁶

Another juror, Maxine Symmank, testified that she consulted the Bible privately and that she remembered another juror reading from the Bible to a small group of jurors.¹⁷⁷ She also testified that she was unsure whether the jury consulted the Bible before or after the jury had assigned its verdict.¹⁷⁸ Most critically, “Symmank confirmed . . . that no juror explicitly stated that the jury should use the Bible as evidence in its deliberations.”¹⁷⁹

The court should not have considered silence as affirmative evidence that every juror who read from the Bible was not prejudicially influenced in arriving at his or her final decision. The case *Lucero v. State* is instructive on how the trial court should have handled the evidentiary hearing.¹⁸⁰ In *Lucero*, each member of the jury explicitly stated that the jury foreman’s reading of a Biblical passage during deliberations did not influence their decision.¹⁸¹ Even more relevant, Juror No. 7 wrote, “[t]here was no passage read suggesting that a murderer should be executed under Biblical law. . . . There was no discussion that such a Biblical principle should be considered or applied in this case to the Defendant”¹⁸² In contrast, Oliver’s evidentiary hearing differs from the affidavits submitted by all twelve jurors in *Lucero*.¹⁸³ Unlike *Lucero*, only four of the jurors testified at Oliver’s evidentiary hearing. Also unlike *Lucero*, the jurors in Oliver’s trial did read passages suggesting execution of a murderer pursuant to Biblical law. Finally, unlike *Lucero*, the four jurors in Oliver’s trial never explicitly stated that assigning Oliver’s sentence included consideration of the teachings in the Bible.

Based on testimony from the evidentiary hearing, the trial

176. *Id.*

177. *Id.*

178. *See id.*

179. *Id.*

180. 246 S.W.3d 86 (Tex. Crim. App. 2008).

181. *Id.* at 91.

182. *Id.* at 93.

183. *Id.* at 91.

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court entered the factual finding that the presence of the Bible during jury deliberations did not taint Oliver's conviction or sentence.¹⁸⁴ Although FRE 606(b) and relevant jurisprudence prohibit investigation of the jurors' mental processes during deliberation,¹⁸⁵ silence alone qualifies as definitive support for finding that Oliver's jury was uninfluenced by use of the Bible. Furthermore, even when questioned within the confines of FRE 606(b) there is almost no incentive for a jury to admit misconduct and threaten the finality of the verdict. Juries that previously found the defendant guilty and, in some cases, sentenced him to death, may not wish to acknowledge the impropriety of unsanctioned use of the Bible. To do so would undermine the jury's efforts used to reach the guilty verdict. Without additional evidence to bolster the trial court's factual finding that use of the Bible did not influence the jury, reliance on the silence of the testifying jurors alone is imprudent and unconvincing.

The trial court's factual finding appears to set forth a curious proposition: although some courts have held that the Bible can be an improper influence on a jury, the court in this case held that it had no influence as a matter of fact. In other words, the jury erred in consulting the Bible but this error was harmless. Courts and legal scholars agree that the jury must follow federal law and not the dogma set forth in the Bible, but disagreement about how to draw the line and what kind of evidence is relevant makes fact-finding particularly important.¹⁸⁶ Some courts have definitively held that the Bible constitutes an external influence on the jury thereby violating the defendant's constitutionally protected right to an impartial jury.¹⁸⁷ Thus, the proposition that the Bible can be an improper influence under the law and yet simultaneously have no influence as a matter of fact is difficult to reconcile.

The fact-finding process review model requires that federal habeas court assess the state court's arguments justifying factual findings. Simply because the trial court did not ask if the Bible influenced the four jurors who testified does not justify the

184. *See Oliver*, 541 F.3d at 332.

185. FED. R. EVID. 606(b).

186. *See discussion supra* Part II.B-C.

187. *See discussion supra* Part II.B.1-2.

conclusory leap that all twelve jurors, together, were uninfluenced by the presence of the Bible. Factual findings must be supported by something more. To argue that Oliver received fair presentation of evidence, weighed by a neutral jury and shielded from possible sources of prejudice, is neither well-reasoned nor well-supported by the text of the opinion. Under the fact-finding process review model, the trial court's conclusion would fail.

2. *Defeat of Appellate Court Findings*

Following the trial court's denial of his request for a new trial, Oliver appealed to the Texas Court of Criminal Appeals.¹⁸⁸ That court affirmed the trial court's decision to deny the motion for a new trial and held that:

Oliver had not 'met his burden of showing outside influence. While there was testimony that at least one Bible was brought to the jury room and some passages were read by a few jurors, every juror who testified stated that neither the Court nor another juror claimed that the Bible should be considered as law or evidence in the case.'¹⁸⁹

The court's decision did not indicate why Oliver's showing was insufficient and did not explain what evidence Oliver could have presented to satisfy this burden.¹⁹⁰ Applying the fact-finding process review model, a statement unsupported by the rationale employed by the court to reach its decision is insufficient to justify the finding. Under the fact-finding process review model, the appellate court determinations would also fall short of passing habeas review.

Oliver v. Quarterman is the product of questionable state court analysis, and Oliver's fate rested entirely on the thinly supported findings of the state court. Although the federal habeas court recognized the weaknesses in the state court

188. *Oliver*, 541 F.3d at 332–33.

189. *Id.* at 333.

190. The court simply noted:

While Oliver makes several arguments that the Bible passages might have swayed the jury, he has not presented clear and convincing evidence to rebut the presumption of correctness that we must afford the state court's factual finding, particularly given that the state court heard from the jurors themselves and concluded that the Bible did not prejudice their decision.

Id. at 343.

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proceedings, the presumption of correctness rendered the review of his constitutional claim virtually nonexistent. The Fifth Circuit's affirmation of the state court's factual finding was not a meaningful review of Oliver's claim because it could not address the underlying circumstances that led to the state court's decision. The Fifth Circuit's decision was therefore an illogical exercise of the presumption of correctness.

To avoid a situation like the one presented in *Oliver v. Quarterman*, the fact-finding process review model should apply to federal habeas corpus review of factual findings when such determinations are insufficiently supported by the state court opinion. The application of this model to the fact-finding process is an effective remedy that fulfills the general goals and policies of habeas corpus review.

B. Why the Fact-Finding Process Review Model Should Apply to Federal Habeas Corpus Review of Factual Findings

Questions of fact must undergo the same rigorous scrutiny applied to questions of law, for the same principles first propounded by the reasoning-process review model.¹⁹¹ Because federal law is the preeminent "Law of the Land,"¹⁹² the reasoning-process review model advocates that state courts must cite all relevant federal law and satisfactorily apply it to state court proceedings. Failure to comply with governing law has a punitive effect on the defendant and demoralizes the habeas review process. So too does honoring ill-supported fact-finding. Under the reasoning-process review model, a state court's disregard of federal law germane to the case empowers the habeas court to return the case to state court for further analysis.¹⁹³ Supplemental inquiry guarantees that state courts strictly adhere to federal law without overturning insufficiently supported decisions outright.¹⁹⁴ Likewise, returning poorly-reasoned findings of fact to the state court for additional consideration furthers the petitioner's opportunity to present his case and ensures protection of all constitutional rights.

191. See Semeraro, *supra* note 20, at 898–99.

192. *Id.* at 926 (citing U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land").

193. *Id.* at 929.

194. See *id.*

The reasoning-process review model developed for questions of law applies to findings of fact because an improper understanding of the law influences factual findings. However, because the Supreme Court has declined to hear petitions for writ of habeas corpus on the precise legal issue, the reasoning-process review model becomes difficult to implement. Since no federal law exists that governs the legal issue, unreasonable application or misinterpretation of the law results in denying the writ.¹⁹⁵ In this context, the model becomes even more critical when applied to state court factual findings because a finding of an unreasonable state court decision based on the evidence presented at trial is the petitioner's last opportunity to have his petition granted.¹⁹⁶

The fact-finding process review model protects a petitioner's constitutional rights while preserving the deference afforded to state court factual findings. The protection of a petitioner's rights under the model does not come at the expense of setting convicted criminals free. Furthermore, the model reflects the equitable notion that state courts should earn the presumption of correctness.

1. The Fact-Finding Process Review Model Protects Petitioners' Constitutional Rights While Preserving Deference Afforded to State Court Factual Findings

The fact-finding process review model prevents the habeas court from overturning state court factual findings outright, yet provides more oversight of and accountability for state court determinations during the habeas review process.¹⁹⁷ The model does not grant the federal habeas court authority to instantly decide the merits of the claim when the state court fails to

195. 28 U.S.C. § 2254(d)(1) (2006). A petition for federal habeas corpus will not be granted unless the "decision . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . ." *Id.* (emphasis added).

196. *See id.* § 2254(d)(2). A petition for federal habeas corpus will not be granted unless "adjudication of the claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*

197. *See Semeraro, supra* note 20, at 929–30 (asserting that the habeas court should not be permitted to disturb the merits of the claim except in rare instances where the state court repeatedly fails to apply federal law).

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engage in sufficiently thorough reasoning.¹⁹⁸ If the state court does not provide sufficient justification for its factual findings, the habeas court should identify the weaknesses in the rationale and direct the case back to the state system for further examination.¹⁹⁹ To do otherwise would allow a state court to escape having to reexamine and correct its misapplication or interpretation of federal law.²⁰⁰ Furthermore, “*de novo* review might even provide . . . sloppy reasoning on politically charged constitutional issues, leaving the federal court the tough job of overturning a popular conviction.”²⁰¹

Under the reasoning-process review model, a state court that habitually declines to apply federal law provides the habeas court the authority to directly review the merits of the state court’s decision.²⁰² Likewise, under the fact-finding process review model, a state court that habitually declines to articulate the reasoning for its factual findings provides the habeas court the opportunity to review the merits of the decision. This ensures that the petitioner’s application for a writ of certiorari to the Supreme Court serves as a genuine safeguard for review of the merits of the case.²⁰³ In addition, the protection of a petitioner’s constitutional rights under the fact-finding model will not come at the expense of more criminals being set free.

198. *See id.* at 929 (“When a state court fails to meet the reasoning-process review standard, the federal habeas court should *not* decide the merits of the issue itself. That approach would improperly let the state court off the constitutional hook that should require it to treat federal law as the supreme law.”).

199. *Id.* Although some scholars argue that to return a case to state court is demeaning, Semeraro argues that it is more demeaning to allow a habeas court overturn outright a decision based purely on disagreements over the merits of the claim. *Id.*

200. *See id.*

201. *Id.*

202. *Id.* at 930.

203. *Id.* Semeraro asserts that this creates a “clear line of demarcation between the role of (1) the lower federal courts (to review the state court’s reasoning process); and (2) the United States Supreme Court, which could also review federal issues *de novo* when it chose to grant *certiorari* directly to review a state court decision.” *Id.*

2. *Protection of a Petitioner's Constitutional Rights Under the Fact-Finding Process Review Model Does Not Result in the Release of More Criminals*

Granting a petitioner more effective access to review does not necessarily assure a different outcome. It is true that if the habeas court finds a denial of the petitioner's constitutional right, his conviction may ultimately be overturned or a new trial may be ordered. But rather than upset a verdict, the fact-finding process review model forces state courts to scrutinize their own factual findings and declare on the record the reasoning in support of their conclusions. By closely guarding the petitioner's constitutional rights during the state court proceedings, the model perpetuates justice. Insufficient protection of constitutional rights grants the federal habeas court authority to point out instances of state court error and send the case back for additional analysis.²⁰⁴

Citizens and legal scholars share a common fear that loosening the rigorous standards of federal habeas corpus review will increase the number of convicted criminals set free.²⁰⁵ Even with the opportunity to begin the trial anew there is no immediate risk that any petitioner will escape punishment. If the evidence strongly suggests the defendant's culpability, then a new and impartial jury would most likely arrive at the same conclusion. Upon finding the defendant guilty a second time, his sentence would be assigned based on neutral assessment of the facts and evidence presented at trial. Implementing the fact-finding process review model to federal habeas review of factual findings not only enhances justice by protecting the petitioner's constitutional rights, but also protects society by not releasing more criminals than would otherwise be released under the current system.

The fact-finding process review model also reflects the equitable notion that the presumption of correctness should be earned, especially when a court fails to sufficiently articulate

204. *See id.* at 928 (“[O]pinions wholly failing to cite significant federal authority would be returned to state court for consideration of that law.”).

205. *See id.* at 907 (citing Judge Henry Friendly's commentary on the costs of broad federal habeas corpus review); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146–49 (1970).

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support for factual findings.

3. *State Courts Should Earn the Presumption of Correctness*

In the interest of justice, it is fair to require that state courts earn the presumption of correctness awarded to their decisions. Although federal law commands that the habeas court give great deference to a factual finding made by a state court,²⁰⁶ that deference should be reasonable. The habeas court should not blindly accept *any* factual finding made by the state court without also considering the reasons that led to the state court's ultimate conclusion.²⁰⁷ To allow otherwise is an unacceptable and ineffective exercise of the federal habeas system.²⁰⁸

Denial of a right guaranteed by the Constitution is a serious charge. Providing the petitioner a full and complete opportunity to present the basis of his allegation ensures protection of that right. Justice demands that the current habeas process be more than a mere promise of meaningful and substantive review. It must, in effect, give the petitioner a legitimate opportunity to bring forth his claims and have those claims heard by a reviewing court that has the power to recognize and remedy constitutional violations.

Questioning the presumption of correctness allows the federal habeas court to more effectively balance the competing interests of preserving verdicts and protecting the constitutional rights of the petitioner. The fact-finding process review model modifies the current standard of federal habeas corpus review to preserve deference given to state court factual findings when appropriate.²⁰⁹ It also empowers the habeas court to address

206. See 28 U.S.C. § 2254(e)(1) (2006); see, e.g., *Oliver v. Quarterman*, 541 F.3d 329, 333 (5th Cir. 2008).

207. See Semeraro, *supra* note 20, at 926. Semeraro writes:

By effectively encouraging state court inattention to federal issues, the Court's objective-reasonableness standard is at odds with Article VI, which mandates that 'states shall be bound' by federal law and must treat it as the 'supreme Law of the Land.' That clause should prohibit a state court from trivializing federal law, and thus compel the federal courts to reject any standard of review that countenances lax state court decision-making.

Id.

208. See *id.*

209. See *id.* at 936 (noting that if the state court considers all applicable federal law and thoroughly analyze the factual issues presented, under the

obvious instances of unreasonable application of federal law and correct overt injustice.²¹⁰

The fact-finding process review model sets forth clear guidelines for a federal habeas court when confronted with inadequate fact-finding by the state court. The model does not posit a dramatic change in existing federal habeas law, but instead encourages a modification when poorly-articulated reasoning significantly undermines the presumption of correctness granted to state court factual findings.²¹¹ Implementing this small change to federal habeas corpus review would bring a degree of accountability to state court interpretation and application of federal law. The model would also create a body of well-articulated precedent that could then ensure consistent rulings in factually similar cases. Furthermore, the petitioner would be subject to a less stringent burden of proof when the state court does not support its factual findings in the body of the opinion.

The fact-finding process review model protects constitutional rights by preserving the presumption of correctness afforded to factual findings only when the opinion adequately supports such findings. Subtle modification of the modern federal habeas corpus standard of review removes the obstacle presented by the presumption of correctness from the petitioner's path to remedy when the presumption is given despite unreasonable or poorly-articulated factual findings. Once the habeas court determines the state court's justification for its factual findings fails fact-finding process review, the state court receives the case for reconsideration. By remanding the case, the state court must reexamine—or perhaps reconsider—its justification for the factual finding based on the observations and recommendations of the habeas court.

reasoning-process review model its decisions would be summarily affirmed).

210. *See id.* at 929–930 (mandating that upon discovery of insufficient reasoning the case is returned to the state court for further analysis).

211. *See id.* at 936 (arguing that “an inferior decision-maker is entitled to deference when making decisions within its area of primary expertise so long as it demonstrates that it treats the decision with an appropriate level of care. That rationale applies with full force to state courts making decisions on criminal cases . . .”).

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CONCLUSION

The current federal habeas corpus standard of review sets a high bar for petitioners who seek to challenge state court factual findings. Because state court factual findings receive a presumption of correctness, the habeas petitioner must strive to overcome this hurdle with clear and convincing evidence that the presumption is undeserved. There is no clear mandate on what evidentiary showing would successfully rebut the presumption of correctness. Without federal law to guide the state court's analysis, confusion can result. This may lead to improper interpretation of federal law which may result in improper reasoning in support of factual findings.

Oliver v. Quarterman is one instance where the presumption of correctness afforded to a state court's unreasonable or poorly-articulated factual findings limited the habeas court's ability to address such inadequacies, and ultimately resulted in the denial of Oliver's petition. The denial of Oliver's final petition—petition for certiorari with the U.S. Supreme Court²¹²—almost guarantees his execution in the state of Texas in the near future. Under these circumstances, it is reasonable for society to expect more satisfactory application and interpretation of law and factual findings from a justice system that is rooted in protecting a criminal defendant's rights. Furthermore, society should expect legal scholars and the federal judiciary to develop a remedy to protect capital defendants from facing arbitrary or capricious execution.

This Note proposes a modification of the reasoning-process review model, which effectively applies to state court findings of fact. The fact-finding process review model allows the federal habeas court to balance two critical interests when assessing findings of fact: ensuring that the petitioner's challenge receives accurate application of federal law and maintaining the deference afforded to state court factual findings.

State court findings of fact are strongly guarded by a presumption of correctness, but that presumption should only be granted if reasonable. The fact-finding process review model requires a state court to support its factual findings with clear

212. Petition for Writ of Certiorari, *Oliver v. United States*, No. 08-833 (5th Cir. Jan. 5, 2009).

and rational reasoning. The fact-finding process review model thus expands the authority of the federal habeas court and its ability to correct constitutional violations by returning the case to the state court. As a result, the petitioner's constitutional claim receives thorough reconsideration by the state court and the federal habeas court is unable to overturn fact-finding outright. Ultimately, criminal convictions require reasonable judiciary findings when the loss of life and liberty is the price the defendant pays.

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