No. 09-617

In the Supreme Court of the United States

BRANDON LEON BASHAM, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the misconduct of a juror who called several news outlets during trial constitutes structural error, reversible without any showing of prejudice.

2. Whether the district court abused its discretion in concluding that petitioner was not prejudiced by the juror's calls after finding that no juror received any substantive information about the case from the media.

3. Whether the district court abused its discretion in denying petitioner's motion for further investigation into the juror's calls to other jurors after holding multiple evidentiary hearings and taking testimony from all jurors.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 561 F.3d 302. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 73a-92a) and its contempt order (Pet. App. 93a-106a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2009. A petition for rehearing was denied on June 26, 2009 (Pet. App. 107a.) On September 9, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 23, 2009, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of carjacking resulting in death, in violation of 18 U.S.C. 2119; kidnapping resulting in death, in violation of 18 U.S.C. 1201(a); interstate transportation of a stolen vehicle, in violation of 18 U.S.C. 2312; conspiracy to commit carjacking, kidnapping, interstate transportation of a stolen vehicle, felon in possession of a firearm, and possession of stolen firearms, in violation of 18 U.S.C. 371; conspiracy to use and carry firearms during and in relation to, and to possess firearms in furtherance of, crimes of violence, in violation of 18 U.S.C. 924(*o*); using and carrying firearms during and in relation to, and possessing firearms in furtherance of, crimes of violence, in violation of 18 U.S.C. 924(c); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g); and possession of stolen firearms, in violation of 18 U.S.C. 922(j). Pet. App. 14a. He was sentenced to death on the carjacking and kidnapping counts and to a total of 744 months of imprisonment on the remaining counts. *Id.* at 18a. The court of appeals affirmed. *Id.* at 1a-72a.

1. In November 2002, petitioner and Chadrick Fulks escaped from a prison in Kentucky and went on a multi-state crime spree in which they killed two women. Pet. App. 2a-13a.

First, petitioner and Fulks kidnapped a man, tied him up, and stole his car. They drove to Indiana where they met Tina Severance, a former girlfriend of Fulks, and her friend Andrea Roddy. Aided by the women, the men stole firearms from a friend of Severance. Peti-

tioner, Fulks and the two women then drove to West Virginia, where they rented a motel room near Huntington. Pet. App. 2a-5a.

On November 11, 2002, petitioner and Fulks left the two women at the motel room. The same evening, Samantha Burns, a college student who worked at a mall in Huntington, called home and said that she was at a friend's house and would be leaving soon. During the morning of November 12, a local fire department team went to a cemetery three miles outside of Huntington to investigate a report of an explosion and a fire. They found Burns's burnt-out car there. When petitioner and Fulks returned to their motel room that morning, petitioner was wearing around his neck a ring that belonged to Burns. A candy box that belonged to Burns was later found in the vehicle the men had been driving. Burns was never seen alive again. Pet. App. 5a-6a.

Petitioner, Fulks, and the two women next drove to South Carolina. Petitioner and Fulks left the women at a hotel room in Myrtle Beach and, after a thwarted attempt to steal firearms from a home, drove to a Wal-Mart in Conway. Pet. App. 6a-7a. In the parking lot of the Wal-Mart, petitioner approached a blue BMW driven by Alice Donovan. Petitioner entered the car and forced Donovan to drive to the back of the parking lot, where Fulks was waiting. Fulks entered the car and drove away. Shortly thereafter, at the Bee Tree Farms hunt club in Winnebow, North Carolina, several men saw two men and a woman in a blue BMW. Donovan was never seen alive again. *Id.* at 7a.

Petitioner and Fulks returned to their motel in Myrtle Beach and told the two women that they had to leave because the police were after them. On November 17, 2002, petitioner tried to carjack a vehicle at the Ashland

Mall in Ashland, Kentucky. He fled as the police approached, firing a gun at a pursuing officer. Police arrested petitioner and seized from him a knife that belonged to Donovan. Meanwhile, after hearing a news report of petitioner's arrest, Fulks fled in Donovan's BMW to his brother's residence in Indiana, where he was arrested on November 20, 2002. Pet. App. 7a-10a.

During interrogation following his arrest, petitioner made incriminating statements about his role in the killings of Burns and Donovan. Later, petitioner agreed to assist law enforcement agents in finding Donovan's body. On November 28, 2002, petitioner accompanied the agents as they searched an area in Brunswick County, North Carolina. Near the Bee Tree Farms Cemetery, petitioner was asked "Is this where it happened?" Petitioner replied, "This is it. It is." The searchers did not find Donovan's body. Pet. App. 10a-12a. Petitioner later made incriminating statements in letters to a friend and admitted killing two women in a telephone call to a former middle-school teacher. *Id.* at 12a-13a.

2. In 2003, a grand jury sitting in the District of South Carolina returned a superseding indictment charging petitioner and Fulks jointly with eight counts: carjacking resulting in death, in violation of 18 U.S.C. 2119; kidnapping resulting in death, in violation of 18 U.S.C. 1201(a); interstate transportation of a stolen vehicle, in violation of 18 U.S.C. 2312; conspiracy to commit carjacking, kidnapping, interstate transportation of a stolen vehicle, felon in possession of a firearm, and possession of stolen firearms, in violation of 18 U.S.C. 371; conspiracy to use and carry firearms during and in relation to, and to possess firearms in furtherance of, crimes of violence, in violation of 18 U.S.C. 924(*o*); using

and carrying firearms during and in relation to, and possessing firearms in furtherance of, crimes of violence, in violation of 18 U.S.C. 924(c); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g); and possession of stolen firearms, in violation of 18 U.S.C. 922(j). Pet. App. 13a-14a. On September 13, 2003, the government notified the defendants that it would seek the death penalty on the carjacking and kidnapping counts under 18 U.S.C. 3593(a). *Id.* at 14a.

In September 2004, petitioner was tried for 13 days before a jury that found him guilty on all counts. Pet. App. 15a-16a. On November 2, 2004, after a 16-day capital sentencing hearing, the jury sentenced petitioner to death on the carjacking and kidnapping counts and to 744 months of imprisonment on the remaining counts. *Id.* at 16a-18a.[1]

3. On November 3, 2004, the day after the jury returned petitioner's death sentence, a news producer from WSPA, a television station in Greenville, South Carolina, called the prosecutor to tell him that a woman purporting to be a juror in the case had contacted her during the trial. The producer, Shannon Mays, also said that the juror had asked why the station was not covering the trial, told Mays that she believed the jury might have a difficult time reaching a decision in the penalty phase because jurors had different views on the death penalty, and informed Mays that petitioner had "acted out" during the trial. Pet. App. 19a.

The prosecutor immediately informed the district court and petitioner of the call. Pet. App. 20a. On No-

[1] In May 2004, Fulks pleaded guilty to the superseding indictment. In June 2004, a jury imposed a death sentence, which was affirmed on appeal. See *United States* v. *Fulks*, 454 F.3d 410 (4th Cir. 2006), cert. denied, 551 U.S. 1147 (2007).

vember 10, 2002, the district court held a status conference to discuss the issue. *Ibid.* Over the next two months, the court held nine evidentiary hearings and received live testimony from at least 19 witnesses, including all 16 jurors and alternates. *Id.* at 82a.

a. At the first hearing on November 12, 2004, the court learned that Cynthia Wilson, the jury foreperson, had placed the call to Mays. Mays testified that she talked to a person who had identified herself only as a juror in petitioner's case and who wanted to know why WSPA was not covering the trial. Mays replied that the trial was not within WSPA's viewing area and that television cameras were not allowed in federal courtrooms. The caller said that the case would be "good TV" because petitioner had acted up in court and had fallen asleep, and because three jurors were from the station's viewing area in upstate South Carolina. Mays testified that she knew petitioner had fallen asleep at trial because she had read about it in the newspapers, but she did not respond to the caller on that point. The caller then asked Mays whether she was familiar with the case. Mays replied that she was working for an Indiana television station when petitioner and Fulks had escaped from prison and her station had covered their escape. At one point, Mays "chuckled" and referred to the trial as a "never ending" case, but she did not disclose to the caller her substantive knowledge of the underlying events. Pet. App. 20a; C.A. App. 2851-2864.

According to Mays, the caller identified "some concern on her part over whether or not Mr. Basham would be sentenced to death, because there were jurors that were for the death penalty and others that were not." C.A. App. 2853, 2866. Mays assumed that the caller made that statement because she was fearful the jury

would not reach a death verdict. *Id.* at 2866. Mays had no indication from the caller that the jurors were already discussing the case. *Id.* at 2868. The caller ended the conversation by telling Mays that she would be available for an interview after trial. Mays advised the caller to make contact again at that point. *Id.* at 2851-2854, 2862-2863.

Wilson testified that she was the one who had placed the call to Mays and that she had also called two other television stations: WHNS in Asheville and WYFF in Greenville. Wilson stated that she had made the calls because of the nature of petitioner's crimes and to make "people * * * aware." She testified that she spoke to one media person who knew that petitioner had escaped from prison, but that she learned no additional information from the calls. Wilson said that she did not disclose any trial information or the jury's views about the case to the media persons because she did not know any other juror's views. According to Wilson, the jurors did not discuss before deliberations the penalty to be imposed on petitioner. Wilson added that she could not recall whether the jurors had any philosophical discussions about the death penalty. Pet. App. 20a; C.A. App. 2904-2908, 2910-2911.

Wilson further testified that she did not do any research about the case on the Internet while she was a juror. She admitted that her husband had done Internet research about the case, but she said that he did not discuss the merits of the case with her until the trial was over. She denied that anyone talked to her about the case during the proceedings. She also denied telling any newsperson that petitioner had acted up or had fallen asleep during trial or that the jury might not reach a penalty verdict. Pet. App. 20a; C.A. App. 2909-2914.

b. Following Wilson's initial testimony, petitioner moved for further proceedings on whether the jury had engaged in premature deliberations. The district court granted that request and held hearings on November 18 and November 23, 2004. At those hearings, the court heard testimony from all of the remaining jurors and alternates. None mentioned that Wilson had brought any external information to his or her attention. Pet. App. 21a.

Juror Shelda Richardson testified that she did not deliberate prematurely but that Wilson had asked her how she felt about certain issues. Richardson explained that Wilson had commented on some witnesses' testimony to gather feedback. Richardson also testified that Wilson had conversations with other jurors but that Richardson did not know the substance of those conversations. Pet. App. 21a; C.A. App. 2944-2947. Richardson explained that she stopped talking to Wilson when Wilson tried to discuss the case. Richardson believed that Wilson was an "either[/]or" person who "already had her mind made up to a certain degree." Pet. App. 21a (quoting C.A. App. 2970). Richardson did not remember the "specifics" of her conversations with Wilson but testified that Wilson "never said anything" about how Wilson felt about the death penalty, and Wilson did not ask Richardson about her "attitude" concerning the death penalty before deliberations. C.A. App. 2969-2971; Pet. App. 21a.

Juror June Robertson testified that she did not know whether any juror had deliberated prematurely and that Wilson had not "questioned" her. Robertson had seen Wilson talking to another juror during the penalty

phase, but Robertson did not know the subject of their discussions.[2] C.A. App. 2955-2957, 2976-2977.

The court recalled Wilson twice during the November 23 hearing. During the first round of testimony, Wilson stated that she did not recall the names of the persons with whom she spoke at the television stations but that neither any media person nor her husband had given her any information about petitioner's case. Wilson testified that she talked with her fellow jurors only about personal matters. Wilson also testified that during the penalty phase, one juror had heard juror Richardson say that her church was opposed to the death penalty but that she would have to weigh all of the evidence in this case. Wilson denied asking Richardson to comment on the substance of any witness's testimony. C.A. App. 2992-2999.

Gregory Wilson, Wilson's husband, testified that he had "googled" petitioner on the Internet during the trial but that he did not disclose his research to Wilson until the trial was over. He further testified that Wilson was "excited" when she learned that she had been selected as a juror. C.A. App. 3000-3007.

Wilson testified again after her husband, stating that during the penalty phase she and two jurors had a brief discussion about a defense witness's description of a scientific test. Wilson testified that her motive in calling the television stations was to promote "public safety awareness" because of the way the crime had been committed. She stated that, after the trial, she had tried to arrange self-defense classes for people who live alone. C.A. App. 3023-3027; Pet. App. 20a.

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[2] Another juror testified that she was not involved in any premature deliberations but that she and Wilson had talked about Wilson's nursing experiences during the trial. C.A. App. 2958-2960.

c. The district court postponed additional hearings to allow petitioner to obtain Wilson's telephone records. On December 13, 2004, the district court learned that Wilson had called two newspapers in addition to the three television stations. According to her phone records, Wilson had made a six-minute call to WSPA, two one-minute calls and a four-minute call to WHNS, a two-minute call to WYFF, a two-minute call to the Greenville News, and a one-minute call to the Spartanburg Herald. Wilson had not mentioned the latter two calls in her initial testimony. Pet. App. 21a-22a. All of the calls were made on October 29, 2004, after the close of evidence in the penalty phase proceeding but before jury instructions were given and deliberations began. *Ibid.*

The district court then contacted the media outlets revealed by the phone records and held additional hearings to determine whether any other reporters remembered speaking to Wilson. On December 21, 2004, a WHNS employee testified that he had investigated the matter, that no employee remembered taking a call from Wilson, and that, in any event, such a call would not have received attention because petitioner's trial was outside WHNS's coverage area. Pet. App. 22a; C.A. App. 3122-3125. Stephanie Moore, a WYFF employee, testified that she emailed her supervisors about a call to the station reporting that closing arguments in petitioner's case would begin the following Monday and asking whether "we care." Moore further testified that the caller was a female and that, although the caller might have said her name, she had not identified herself as a juror. Moore did not recall her response to the caller, but she testified that such a call would normally have led her to email the management. Moore testified that she

might have said something to the caller about her knowledge of the case. Pet. App. 22a; C.A. App. 3126-3135.

The district court stated that it had *sua sponte* contacted the Spartanburg Herald and the Greenville News. The court related that an employee of the Spartanburg Herald confirmed that the paper had investigated the matter but that nobody could recall taking a call from Wilson. Later, the Greenville News informed the court that, despite a diligent search, it could not find any person who remembered taking a call from Wilson. C.A. App. 3135-3143, 3253-3254.

At the conclusion of these hearings, the district court recalled Wilson and asked her about her phone calls to the newspapers, which Wilson said she did not remember making. Petitioner's counsel then asked Wilson about an 11-minute telephone call that she had made to another juror just before she called the news outlets. Wilson testified that she had merely offered the juror a landscaping job at her house. Asked about WYFF employee Moore's testimony concerning the call to the station, Wilson testified that she did not recall making any statements to Moore but that it was possible Moore made statements to her. Pet. App. 22a; C.A. App. 3148-3155.

e. On January 14, 2005, petitioner moved for a further investigation because Wilson's telephone records showed that she had made 71 telephone calls, many of them lengthy, to two other jurors in September and October 2004 and that Wilson and her husband had called each other during trial. The court denied the motion, noting that it had already heard testimony from the two other jurors on the calls and that it had credited their testimony that they did not deliberate prematurely.

Pet. App. 22a-23a; C.A. App. 3176-3184, 3229-3230, 3234-3237.

4. a. On February 14, 2005, after briefing and argument, the district court orally denied petitioner's motion for a new trial. C.A. App. 3255. On March 14, 2005, the court explained its reasoning in a lengthy opinion. Pet. App. 73a-92a.

The court found as a factual matter that, despite Wilson's calls to the television stations, none of the reporters provided "any information to Wilson regarding the case or otherwise attempt[ed] to influence the jury." Pet. App. 79a n.4. The court explained that Moore and Mays "were clear in their assertion that no information had been imparted to Ms. Wilson during the conversations," *id.* at 83a, and that although there were some conflicts between Mays's testimony and Wilson's testimony, "none [was] significant for purposes of the motion." *Id.* at 79a n.4. The court stressed that there was "no indication that the conduct resulted in any information being given to the juror from an outside source[, n]or was there any testimony that the two news representatives * * * suggested to her what the verdict should be in the case." *Id.* at 83a. The court also found that Wilson did not disclose to the other jurors her telephone calls to the media, *id.* at 89a, and that—because Wilson did not call the stations following the verdict—there was a "degree of credence" in her testimony that her motive had been to educate the public about safety issues. *Id.* at 78a n.3.

Turning to the applicable law, the court concluded that the framework set forth in *Remmer* v. *United States*, 347 U.S. 227 (1954), controlled petitioner's claim of juror misconduct. Pet. App. 84a-97a. The court rejected the government's argument that *Remmer* had

been undermined or invalidated by subsequent decisions. *Id.* at 84a-85a. Applying *Remmer*, the district court reasoned that Wilson's misconduct was "presumptively prejudicial," *id.* at 84a (quoting *Remmer*, 347 U.S. at 229), and that the government bore a "heavy burden" to rebut that presumption by showing that "there is no reasonable possibility that the jury's verdict was influenced by an improper communication," *id.* at 87a, 90a (internal citations omitted). Addressing the "unique situation" presented by this case, *id.* at 88a, the court concluded that the government had overcome the *Remmer* presumption of prejudice because there was "no indication that the media outlets attempted to influence the juror in any way," that the outlets "were motivated to influence the outcome of the case," or that Wilson "informed the other members of the jury about the phone calls." *Id.* at 89a.

The court rejected petitioner's contention that "juror misconduct represents structural error which always requires reversal" even if there was no "determinable influence on the jury." Pet. App. 90a-91a. The court reasoned that, "under established precedent," a juror's violation of the court's instructions "is not subject to structural error analysis" but instead may be reviewed for harmlessness. *Id.* at 91a.

In addition, the court observed that petitioner had abandoned any claim that the jurors prematurely deliberated about the case. Pet. App. 79a n.5. The court noted, however, that "[h]ad the issue been presented, the court would have determined, after having heard sworn testimony from all sixteen jurors, that there had been no premature deliberations." *Ibid.*

b. In a separate opinion, the district court held Wilson in contempt of court for violating instructions not to

discuss the case outside of deliberations. Pet. App. 93a-106a. The court specifically declined to hold Wilson in contempt on the ground that she had not been completely forthcoming in her testimony about her phone calls to the media. Instead, the court gave Wilson "the benefit of the doubt" on that score, crediting her assertion that she had forgotten certain events during her testimony. *Id.* at 101a-102a. The court ordered Wilson to return $2500 of her jury service fee and to perform 120 hours of community service. *Id.* at 104a-105a.

5. The court of appeals affirmed. Pet. App. 1a-72a. The court first rejected petitioner's argument that egregious juror misconduct constitutes structural error that cannot be reviewed for harmlessness. *Id.* at 27a n.8. Like the district court, the court of appeals instead analyzed petitioner's claim under the *Remmer* framework, noting that the government had conceded that Wilson's outside communications triggered *Remmer's* "presumption of prejudice." *Id.* at 27a. The sole question, the court reasoned, was "whether 'there exists no 'reasonable possibility that the jury's verdict was influenced by an improper communication.'" *Ibid.* The court noted that a "variety of factors" inform that inquiry, "including the extent of the improper communication, the extent to which the communication was discussed and considered by the jury, the type of information communicated, the timing of the exposure, and the strength of the Government's case." *Id.* at 27a-28a.

Applying those factors, the court concluded that the government had carried its burden of proving that petitioner had not been prejudiced by the outside contacts. The court reasoned that Wilson's conversations with the media were "minimal," lasting at most six minutes, and there was no indication "that the media outlets even pro-

vided any information to Wilson." Pet. App. 28a. The court also explained that, to the extent Wilson was told that one reporter had previously covered petitioner's escape from prison, that information was "obviously cumulative of what the jury had already heard." *Id.* at 29a. In addition, the court noted the district court's finding that Wilson did not inform the other jurors about the phone calls. *Ibid.*

The court acknowledged that the timing of the calls was "troubling" because they occurred just before deliberations began. But the court concluded that the district court did not abuse its discretion in denying petitioner's new trial motion given its finding that "Wilson received no substantive information during these phone calls." Pet. App. 29a.

In a footnote, the court rejected petitioner's related claim that the district court erred by not conducting additional proceedings about Wilson's 71 phone calls to two other jurors. The court reasoned that a district court has broad discretion in investigating juror misconduct claims. No further inquiry was necessary, the court explained, because the district court had already decided, after extensive hearings, that Wilson had received no information from the news outlets and had not informed the other jurors about her outside contacts. Pet. App. 29a & n.9.

ARGUMENT

1. Petitioner asserts (Pet. 14-23) that the evidence elicited in the district court demonstrates that Wilson was actually biased. On that basis, he contends that Wilson's presence on the jury constituted structural error, requiring reversal of his death sentence without regard to any showing of prejudice. The court of appeals cor-

rectly rejected that contention, and its decision does not merit this Court's review. Petitioner's suggestion that Wilson lacked impartiality does not implicate any disagreement about the applicable law, which is well settled, but instead amount to a challenge to the district court's factual findings. The testimony on which petitioner primarily relies for his assertions about Wilson's alleged bias, moreover, was elicited in violation of the restrictions in Fed. R. Evid. 606(b) on post-verdict inquiry into internal juror misconduct. Because petitioner's claim is based on a factually erroneous and legally flawed predicate, this Court should deny review.

a. The law governing petitioner's contention concerning Wilson's alleged bias is well established. Under longstanding precedent of this Court, "[t]he constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors." *Murphy* v. *Florida*, 421 U.S. 794, 799 (1975) (internal quotation marks and citation omitted); see *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it."). Because the effects of actual bias on a factfinder cannot be ascertained, the presence of an actually biased juror is a structural error that requires automatic reversal. See, *e.g.*, *Gomez* v. *United States*, 490 U.S. 858, 876 (1989 ("Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury.") (internal quotation marks and citations omitted); *Rivera* v. *Illinois*, 129 S. Ct. 1446, 1455-1456 (2009).

The courts of appeals agree about those general principles. Contrary to petitioner's contention (Pet. 21-23), neither the Fourth Circuit in *Sherman* v. *Smith*, 89 F.3d 1134 (1996), cert. denied, 519 U.S. 1091 (1997), nor

the First Circuit in *United States* v. *Tejada*, 481 F.3d 44, cert. denied, 552 U.S. 1021 (2007), applied harmless-error review to verdicts announced by juries that included an actually biased individual. Instead, those cases addressed "*claims* of juror * * * bias" allegedly caused by exposure to potentially prejudicial information. *Sherman*, 89 F.3d 1139 (emphasis added). In order to determine whether the claim was valid—that is, whether the outside contact undermined the juror's impartiality—those courts evaluated the degree of prejudice resulting from the improper influence on the jury. See *ibid.*; *Tejada*, 481 F.3d at 50-52. But the premise of that inquiry is that, if the exposure had in fact been sufficient to cause actual bias in any juror, reversal would be constitutionally compelled.

b. Petitioner's assertion that Wilson was actually biased turns on the particular facts of this case and presents no legal question of broader significance. The factual premises of petitioner's argument, moreover, contradict the findings the district court reached after considering hours of live testimony over the course of nine evidentiary hearings.

Petitioner's claim of actual bias rests primarily on the assertions that Wilson's motive in calling the news outlets was to achieve "stardom," thereby creating a "personal interest in the outcome of the case" (Pet. 15-16); that Wilson displayed her "bias, personal interest, and zeal" for a death sentence by committing perjury during the post-trial hearings (Pet. 16); and that Wilson told other jurors that she had made up her mind to impose the death penalty before deliberations began (Pet. 16).

Those assertions are inconsistent with the district court's factual findings. Rather than concluding that

petitioner contacted reporters in order to "bask in the media spotlight" (Pet. 15), the district court found a "degree of credence" in Wilson's explanation that her motive was to inform the public about safety risks. Pet. App. 78a n.3. The court specifically noted in that connection that Wilson did not call the media again after the jury returned its verdict. *Ibid.* Petitioner emphasizes (Pet. 11) the district court's remark to counsel at the November 18, 2004, hearing that he believed Wilson wanted "her 15 minutes of fame" (C.A. App. 2982), but the court made that comment before Wilson testified on November 23, 2004, that her true motivation was concern for public safety (*id.* at 3026-3027). The district court implicitly repudiated that earlier, preliminary remark in its written opinion. See Pet. App. 78a n.3 (noting, but not accepting, "[d]efense counsel['s] suggest-[ion] that Wilson's motive was more ulterior, contending that she desired her '15 minutes of fame'").

Similarly, the district court did not find that petitioner committed perjury in the post-verdict hearings. Although the district court found discrepancies between the testimony of Mays and Wilson, it expressly concluded that "none of [them was] significant," Pet. App. 79a n.4, and the court accepted Wilson's testimony that her faulty memory explained her initial failure to disclose all of her calls to the news outlets. *Id.* at 102a.[3]

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[3] Petitioner's argument (Pet. 16) that the district court found that Wilson committed perjury is based on the district court's comment to counsel at the November 23, 2004, hearing that "[i]f I determine she committed perjury, which I essentially have when I say I accepted * * * [Mays'] version of what happened, what further interest do you have in what happens to her on a punishment end?" C.A. App. 3069-3070. That casual remark was made before the district court had heard all of Wilson's testimony. See *id.* at 3148-3158. The district court's

The district court also correctly concluded, contrary to petitioner's assertions, that the jury did not engage in premature deliberations. See Pet. App. 79a n.5. Juror Richardson's testimony does not support petitioner's assertion that Wilson had made up her mind about the death penalty before deliberations began. Richardson testified that Wilson was an "either[/] or" person who, in Richardson's opinion, had "basically already had her mind made up to a certain degree." C.A. App. 2970. But Richardson further testified that she did not remember whether Wilson said "anything in general in reference to how she did or didn't feel about the death penalty," and Richardson specifically denied that Wilson had asked Richardson about her views on the death penalty before deliberations. *Id.* at 2970-2971.[4]

c. Review of petitioner's factbound challenge to the district court's findings is also inappropriate for a separate reason: the testimony on which petitioner relies was elicited in violation of the Federal Rules of Evidence and therefore could not properly be considered by this Court.

"[T]he near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict."

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opinion denying petitioner's motion for a new trial and its contempt order represent the final word on Wilson's credibility, and neither supports petitioner's contention that Wilson committed perjury.

[4] Wilson's statement to Mays that some of the jurors were "for" the death penalty but "others * * * were not" (C.A. App. 2853) did not establish that the jurors had deliberated prematurely. At most, it establishes Wilson's impression. Notably, petitioner "dropped[] the issue of premature deliberations," Pet. App. 79a n.5, and cannot resurrect it now in the fact of the district court's contrary finding "after having heard sworn testimony from all sixteen jurors." *Ibid.*

Tanner v. *United States*, 483 U.S. 107, 117 (1987). The "no impeachment" rule advances several important interests. Allowing juror testimony to impeach a verdict would promote harassment of jurors, chill frankness and freedom of discussion in the jury room, deter jurors from returning unpopular verdicts, undermine the community's trust in a system that relies on the decisions of lay people, and disrupt the finality of verdicts. *Id.* at 120-121. Those policies are reflected in Federal Rule of Evidence 606(b), which authorizes a district court to conduct a post-verdict inquiry into whether the jury was improperly exposed to "extraneous prejudicial information" or to an "outside influence," but prohibits a juror from "testify[ing] * * * to the effect of anything upon * * * [a] juror's mind or emotions as influencing the juror to assent to or dissent from the verdict * * * or concerning the juror's mental processes in connection therewith."

Thus, under Rule 606(b), a district court may not conduct a post-verdict inquiry into a juror's mental processes, including his attitude toward the parties or the case, see, *e.g.*, *United States* v. *Gonzales*, 227 F.3d 520, 525-526 (6th Cir. 2000); *United States* v. *Chiantese*, 582 F.2d 974, 978 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979); whether a juror was pressured or coerced by other jurors, see, *e.g.*, *United States* v. *Decoud*, 456 F.3d 996, 1019 n.11 (9th Cir. 2006), cert. denied, 551 U.S. 1116 (2007); *United States* v. *Briggs*, 291 F.3d 958, 961-962, 963-964 (7th Cir.), cert. denied, 537 U.S. 985 (2002); or whether the jury deliberated prematurely. See, *e.g.*, *United States* v. *Logan*, 250 F.3d 350, 378-381 (6th Cir.), cert. denied, 534 U.S. 895 (2001); *United States* v. *Cuthel*, 903 F.2d 1381, 1382-1383 (11th Cir. 1990).

If a district court that is conducting a post-verdict investigation on an outside-influence claim improperly admits evidence of an internal matter, such as a juror's state of mind about the case or whether and to what extent the jury engaged in premature deliberations, the court of appeals must confine its review to the outside influence matter and disregard the improperly admitted evidence about the internal matters. See, *e.g.*, *United States* v. *Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001), *United States* v. *Cheek*, 94 F.3d 136, 143-144 (4th Cir. 1996); *United States* v. *Blumeyer*, 62 F.3d 1013, 1014-1015 & n.1 (8th Cir. 1995), cert. denied, 516 U.S. 1172 (1996).

Here, the district court properly conducted a post-verdict inquiry into Wilson's calls to the news outlets, but it violated Rule 606(b) by eliciting evidence about both Wilson's state of mind concerning the case and whether the jurors had discussed the case among themselves during the trial. In particular, the district court improperly admitted the testimony of Mays, Richardson, Robertson, and Wilson about the jury's internal communications and deliberations, as well as Wilson's husband's testimony about Wilson's state of mind after she was selected as a juror. Accordingly, on appeal, the court of appeals was required to disregard the portion of petitioner's jury misconduct claim that was based on the improperly admitted internal-misconduct evidence and confine its review to petitioner's outside-influence claim. Although the court of appeals did not explicitly address this contention, which the government advanced below, see Gov't C.A. Br. 52-55, the court did properly limit its review to petitioner's external-influence claim and sum-

marily rejected petitioner's "structural error" claim based on the improperly admitted evidence.[5]

This Court's review would similarly be confined to the evidence about external contacts involving Wilson and would not encompass testimony about any jurors' state of mind or the interactions among the jurors. This case therefore does not squarely present even the factbound question whether a particular juror was actually biased or whether the jurors engaged in premature deliberations.[6]

2. Petitioner contends (Pet. 23-29) that the court of appeals erred in upholding the district court's determination that the government rebutted the "presumption

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[5] Petitioner cites no authority for the proposition that a reviewing court that is evaluating an outside-influence claim may also rely on evidence of internal jury matters improperly admitted under Rule 606(b). This Court's decisions in *Turner* v. *Louisiana*, 379 U.S. 466 (1965), *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), *Irvin* v. *Dowd*, 366 U.S. 717 (1961), are inapposite. *Turner* involved external contacts with law enforcement officers who testified for the prosecution and who were also in charge of the jury during the trial. *Irvin* and *Rideau* were pretrial prejudicial publicity cases, and neither concerned a juror bias claim based in part on evidence obtained in violation of Rule 606(b).

[6] In *Wellons* v. *Hall*, 130 S. Ct. 727 (2010) (per curiam), a capital case, this Court granted the petition, vacated the judgment, and remanded the case to the court of appeals for further consideration of the defendant's claim that he was denied discovery or an evidentiary hearing on his assertion that the jury had engaged in misconduct at his trial. In this case, in contrast, the district court has already conducted a full evidentiary inquiry on all material aspects of the juror-misconduct issue. C.A. App. 2851-3155. And the Court's decision did not disturb the evidentiary limits established by Rule 606. Indeed, on remand, the Eleventh Circuit directed the district court to grant discovery and conduct an evidentiary hearing "in keeping with its analysis of" *Tanner*. *Wellons* v. *Hall*, — F.3d —, 2010 WL 1531174 *1 (11th Cir. April 19, 2010).

of prejudice" arising from Wilson's calls to the news media. He argues that certiorari is warranted to resolve disagreements in the court of appeals about whether the framework in *Remmer* v. *United States*, 347 U.S. 227 (1954), has been invalidated by subsequent decisions, as well as what showing the government must make to prevail under that framework. The courts of appeals have adopted varying approaches to the *Remmer* inquiry, but this case does not implicate any such disagreements. Both courts below applied the *Remmer* presumption, and both held the government to a particularly stringent standard for rebutting that presumption. Petitioner therefore has already received full consideration of his claims under the view of the law that is more favorable to him. The court of appeals correctly concluded that the district court's application of *Remmer* was not an abuse of discretion, and there is no reason for this Court to review that factbound determination.

a. In *Remmer*, *supra*, a defendant who had been convicted on criminal charges sought a new trial after learning that, during trial, a third party had attempted to bribe a juror and the district court had initiated an FBI inquiry into the matter. This Court did not hold that a new trial was automatically required because of that improper contact. Instead, the Court remanded the case to the district court "with directions to hold a hearing to determine whether the incident complained of was harmful to the [defendant]." 347 U.S. at 230. In so holding, the Court observed that, "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Id.* at 229. The Court added that the presumption, although "not conclusive," places

the burden on the government "to establish * * * that such contact with the juror was harmless to the defendant." *Ibid.*

More recently, this Court has declined to apply a presumption of prejudice to other claims of jury irregularities. In *Phillips*, the Court held that the proper remedy in a case in which a juror had applied for a position in the prosecutor's office during trial was "a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215; see *id.* at 217 ("due process does not require a new trial every time a juror has been placed in a potentially compromising situation"). In refusing to presume prejudice, the Court explained that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Ibid.*

Likewise, in *United States* v. *Olano*, 507 U.S. 725 (1993), the Court declined to apply any presumption of prejudice when alternate jurors were present during jury deliberations. *Id.* at 737-740. The Court held that no new trial was required in light of a post-verdict inquiry that showed that the alternate jurors did not participate in the deliberations. *Id.* at 739-741. The Court noted that a "presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *Id.* at 739.

b. The courts of appeals have adopted divergent positions on whether and to what extent *Remmer*'s presumption of prejudice survives *Phillips* and *Olano*. The Sixth Circuit has held that the presumption does not exist and that the defendant has the burden of showing actual bias by the juror. See, *e.g.*, *United States* v. *Orlando*, 281 F.3d 586, 596-597 (6th Cir.), cert. denied, 537

U.S. 947 (2002). Other courts of appeals tend to apply the presumption only to certain forms of improper contact and employ varying articulations of the circumstances that trigger the *Remmer* inquiry. See *United States* v. *Honken*, 541 F.3d 1146, 1167 (8th Cir. 2008) (*Remmer* presumption applies only when "the alleged outside contact relates to factual evidence not developed at trial"), cert. denied, 130 S. Ct. 1011 (2009); *United States* v. *Gallardo*, 497 F.3d 727, 735-736 (7th Cir. 2007) (declining to apply *Remmer* presumption where misconduct was not as serious as in *Remmer* itself), cert. denied, 129 S. Ct. 288 (2008); *United States* v. *Barrett*, 496 F.3d 1079, 1102 (10th Cir. 2007) (*Remmer* applies when the contact was "about the matter pending before the jury") (citation omitted), cert. denied, 128 S. Ct. 1646 (2008); *United States* v. *Smith*, 354 F.3d 390, 395 (5th Cir. 2003) (holding that there must be "some evidence of a prejudicial effect before burdening the government with a requirement that it prove the intrusion harmless"), cert. denied, 541 U.S. 953 (2004); *Lloyd*, 269 F.3d at 238 (*Remmer* applies to outside contacts of a "considerably serious nature"); *United States* v. *Boylan*, 898 F.2d 230, 261 (1st Cir.) ("significant" contact or "aggravated circumstances"), cert. denied, 498 U.S. 849 (1990); *United States* v. *Dutkel*, 192 F.3d 893, 895 (9th Cir. 1999) (noting that *Remmer* announced a "special rule" for jury tampering). Other circuits have reserved the issue. *United States* v. *Ronda*, 455 F.3d 1273, 1299 & n.36 (11th Cir. 2006), cert. denied, 549 U.S. 1212 (2007); *United States* v. *Gartmon*, 146 F.3d 1015, 1027-1028 (D.C. Cir. 1998).

c. This case does not present the questions of whether and when the *Remmer* presumption applies, because both courts below concluded that the presump-

tion applied in this case. Nor can petitioner contend that he would have fared better under an alternative articulation of the *Remmer* framework. Both courts below reasoned that the government could rebut the presumption only by showing that there exists "no reasonable possibility that the jury's verdict was influenced by an improper communication." Pet. App. 27a (quoting *United States* v. *Cheek*, 94 F.3d 136, 141 (4th Cir. 1996); *id.* at 87a. Petitioner has not identified any court that imposes on the government a more demanding showing. Because resolving any conflict among the courts of appeals concerning *Remmer* therefore would not benefit petitioner, this case would not be an appropriate vehicle for consideration of that issue.

d. There is no reason for this Court to review the decision below upholding the district court's application of the *Remmer* framework to the particular facts. To determine whether the government has rebutted the "presumption of prejudice," courts consider many factors, including the nature of the contact, the timing of the juror's exposure to the information, and the strength of the government's case. See *Ronda*, 455 F.3d at 1299-1300; *Lloyd*, 269 F.3d at 240-241; *United States* v. *Williams-Davis*, 90 F.3d 490, 497, 501-502 (D.C. Cir. 1996), cert. denied, 519 U.S. 1128 (1997). Those factors apply even if it was the juror, rather than the third party, who initiated the improper contact. See, *e.g.*, *Barrett*, 496 F.3d at 1101-1102; *United States* v. *Sampson*, 486 F.3d 13, 41-42 (1st Cir. 2007), cert. denied, 128 S. Ct. 2424 (2008); *Blumeyer*, 62 F.3d at 1017-1018. Cf. *Phillips*, 455 U.S. at 212 (juror submitted application to prosecutor's officer while sitting on the jury). Courts have concluded that the government rebutted the presumption when the juror was not exposed

to any prejudicial information or the encounter was otherwise innocuous. See, *e.g.*, *Barrett*, 496 F.3d at 1102; *Sampson*, 486 F.3d at 41-42; *Ronda*, 455 F.3d at 1300; *Boylan*, 898 F.2d at 261-262.

In this case, both courts below concluded that the government rebutted the presumption of prejudice because Wilson did not learn any substantive non-cumulative information about the case from her conversations with media personnel.[7] The content of Wilson's conversations with the media representatives and the impact of those conversations on her impartiality are questions of fact, see *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983); *Thompson* v. *Keohane*, 516 U.S. 99, 111 (1995), and this Court ordinarily does not review facts concurred in by two courts below. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Indeed, the prejudice inquiry is similar to harmless error review generally, a task that is usually left to the courts of appeals. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 504 (1987) (noting that this Court undertakes harmless error review only "sparingly"). Thus, review of the court of appeals' fact-bound holding that the government rebutted the presumption of prejudice is unwarranted.

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[7] Petitioner cites (Pet. 23-25) several cases for the proposition that transmission to the juror of "substantive information" is not invariably necessary for a finding of prejudice under *Remmer*. The courts below did not hold to the contrary. They addressed the "unique situation" presented by this case, in which a juror initiates contact with the news media but there is no claim that any third party sought to intimidate or tamper with the jury. Pet. App. 88a. The courts focused on the transfer of "substantive information" to the juror not because that is the only kind of prejudice cognizable under *Remmer*, but instead because that is the kind of potential prejudice created by this particular set of circumstances.

3. Petitioner contends (Pet. 29-33) that, in conflict with *Remmer*, the court of appeals failed to examine the "entire picture" of potential prejudice because it upheld the district court's refusal to conduct further proceedings concerning Wilson's 71 pre-deliberation telephone calls to two other jurors. That contention is incorrect and does not merit further review.

A district court has wide discretion in the amount of investigation that it must undertake when confronted with a claim of jury misconduct. The extent of the inquiry depends on the likelihood that the outside communication contaminated the jury. In some circumstances, a comprehensive inquiry is required, while in others only a limited inquiry is warranted. See *Wisehart* v. *Davis*, 408 F.3d 321, 326 (7th Cir. 2005) (Posner, J.), cert. denied, 547 U.S. 1050 (2006); *Smith*, 354 F.3d at 394.[8]

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[8] Petitioner errs (Pet. 32-33) in contending that the courts of appeals disagree about the amount of investigation that is required in response to a claim of jury misconduct. The courts of appeals recognize that the extent of the investigation depends on the particular facts of the case. Petitioner's reliance on *United States* v. *Vasquez-Ruiz*, 502 F.3d 700 (7th Cir. 2007), and *United States* v. *Resko*, 3 F.3d 684 (3d Cir. 1993), is misplaced. Both cases involved claims of improper contact that were raised during the trial. Accordingly, unlike in this case, Rule 606(b) did not pose any obstacle to investigation of internal jury communications. Both cases also involved less extensive inquiry than the district court conducted here. In *Vasquez-Ruiz*, the district court failed to voir dire the jurors to determine whether any one of them had written the word "guilty" in another juror's notebook, resulting in what the court of appeals considered a "lack of information in this record about the source of the notation." 502 F.3d at 707. Similarly, in *Resko*, the court of appeals concluded that the district court did not conduct a proper investigation into premature deliberations when it refused to voir dire the jurors individually, but instead relied on a questionnaire in which each juror admitted that he had discussed the case with other jurors but had not formed an opinion about the case. Here, in marked contrast, by the

In response to petitioner's claim of jury misconduct, the district court

> held nine hearings on the matter and heard, under oath, from all jurors (regular and alternates) individually, Ms. Wilson (on three different occasions), her husband and two members of the news media. The court * * * heard from a total of nineteen witnesses, authorized the subpoena of hundreds of records of phone calls from as many as three phones and facilitated the cooperation of five media outlets.

Pet. App. 82a. That investigation, which the court of appeals described as "a 'textbook model,'" *id.* at 30a, went "far beyond what is required in this situation," *id.* at 82a. By the time petitioner made the motion for further inquiry into the 71 phone calls, the district court had already heard testimony from every juror—including the two who had participated in the calls—each of whom testified that he or she had not been exposed to any substantive outside information. The district court did not err in crediting that testimony, and it acted well within its discretion in concluding that no further inquiry was necessary. Indeed, any additional investigation would have risked further violation of Rule 606(b). The court of appeals' decision upholding the manner in which the district court conducted the post-hearing inquiry therefore does not merit this Court's consideration.

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time petitioner moved for additional hearings, the district court had already determined that no juror was exposed to any prejudicial outside information after holding lengthy hearings on the issue. In these circumstances, the district court did not abuse its discretion in concluding that no further investigation was warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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