No. 10-1473

In the Supreme Court of the United States

CHRISTOPHER JUDE BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

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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QUESTION PRESENTED

Whether petitioner was denied the right to an impartial jury when a prosecutor who was in the office trying petitioner, but was not involved in petitioner's case, e-mailed a juror about a private accounting matter unrelated to petitioner's case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 638 F.3d 281.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2011. The petition for a writ of certiorari was filed on June 6, 2011. 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 Maryland, petitioner was convicted of production of child pornography, in violation of 18 U.S.C. 2251(a) and (e), possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2), possession of cocaine, in violation of 21 U.S.C. 844(a),

and two counts of distributing a controlled substance to a minor, in violation of 21 U.S.C. 841(a)(1) and 859(a). Pet. App. 2a. He was sentenced to 293 months of imprisonment. *Id.* at 9a. The court of appeals affirmed. *Id.* at 2a.

1. In 2006, petitioner took pornographic pictures of the 14-year-old sister of Erin Ruley, a former girlfriend, and photos of the minor and a minor boy apparently snorting cocaine. Petitioner e-mailed those photographs to another woman, who notified Ruley, who in turn notified the Baltimore Police Department. During a subsequent investigation, the police learned that petitioner had supplied the minors with cocaine, alcohol, and psilocybin mushrooms. Investigators executed a search warrant at petitioner's residence and seized numerous images of child pornography, including sexually explicit images of Ruley's minor sister on petitioner's computer. They also seized trace amounts of cocaine from petitioner's dresser. Pet. App. 2a-8a.

Petitioner was charged with multiple counts of producing and possessing child pornography, in violation of 18 U.S.C. 2251(a) and (e) and 18 U.S.C. 2252(a)(4)(B) and (b)(2), as well as possessing and distributing controlled substances, in violation of 21 U.S.C. 841(a)(1) and 859(a). In November 2008, petitioner was tried before a jury in the District of Maryland.

During petitioner's trial, Michael Leotta was an Assistant United States Attorney in the District of Maryland United States Attorney's Office, which was prosecuting petitioner. Leotta was not involved in petitioner's case. Leotta was also the treasurer of the Francis D. Murnaghan, Jr. Appellate Advocacy Fellowship, Inc., a non-profit legal services organization established as a tribute to the late Fourth Circuit Judge. The tax ac-

countant for the Murnaghan Fellowship was a juror in petitioner's case. Pet. App. 25a.

On November 14, 2008, several days into the trial, Leotta, who did not know that the accountant was serving as a juror, e-mailed him with an invoice for services. On the morning of November 17, Leotta received a response e-mail from the juror, who stated that supplying the accounting bill would be "[n]o problem." The juror then added: "On jury duty this week up in Baltimore. Federal case—child porn etc . . . loving life (sarcasm). You guys do not get near enough the credit you deserve for what you do! I had no idea what it takes to do your job. I'm sure you don't get paid enough either." Pet. App. 25a. Leotta did not respond to that e-mail. Instead, he immediately reported the incident to a professional responsibility attorney in his office. Within three and a half hours, Leotta and his office ascertained the identity of the case in which the juror was serving and informed the attorneys trying the case about the juror contact. By that time, the jury had returned a verdict. The trial attorneys then reported the contact to the district court and petitioner. *Id.* at 46a; 3/27/09 Tr. 22-25 (Tr.); Gov't Resp. to Mot. for New Trial 1 (filed Apr. 8, 2009).

2. Petitioner moved for a new trial based on juror misconduct. The district court held an evidentiary hearing on the motion, in which the juror and Leotta were the only witnesses. The juror testified that he did not know Leotta personally and had never met him. The juror e-mailed Leotta about once a year about his accounting work for the Murnaghan Fellowship. The juror further testified that he had not known that Leotta was a federal prosecutor; in fact, he had believed that Leotta was a lawyer for the State who did "trial stuff." He ex-

plained that his "loving life (sarcasm)" remark referred to his exposure to the "disgusting" child pornography evidence in the case, and that his statement that "you guys" do not get "not enough credit" and are "not paid enough" reflected his admiration for all of the trial participants, including defense lawyers and court reporters. He characterized them as working under pressure, and stated that like a fireman entering a burning building to save a child, "I don't think you can put a price tag on what you guys do here, and you're all paid on the public dime." The juror also stated that his verdict was not influenced by any outside considerations. Tr. 6-7, 9-18.

The district court denied petitioner's motion for a new trial. The court stated that under *Remmer* v. *United States*, 347 U.S. 227, 229 (1954), a private communication with a juror during trial about the matter pending before a jury is deemed presumptively prejudicial, requiring the government to prove that the contact was harmless. Pet. App. 46a. But, the court explained, an extrinsic contact not involving the case is not presumptively prejudicial and requires a showing of prejudice to justify a new trial. *Id.* at 46a-47a. To trigger the presumption of prejudice, the defendant must show that the contact constituted more than an innocuous intervention. *Id.* at 47a (citing *Howard* v. *Moore*, 131 F.3d 399, 422 (4th Cir. 1997), cert. denied, 525 U.S. 843 (1998)).[1]

The court ruled that Leotta's e-mail to the juror did not trigger a presumption of prejudice because the sub-

[1] The district court also found that because the juror had only an occasional professional relationship with Leotta, the juror did not lie when, during voir dire, he did not respond when the court asked the venire whether any member had a "close friend" or "close family member" employed by a law enforcement agency. Pet. App. 49a-51a.

ject of the e-mail—the invoice—was unrelated to the trial, Leotta did not know that the juror was serving as a juror, Leotta was not involved in petitioner's case, and Leotta did not attempt to influence the verdict. Pet. App. 46a-49a.

The district court also ruled that the juror's comments did not demonstrate that he was actually biased. The court credited the juror's testimony that he thought that Leotta was a state prosecutor, and his e-mail expressed admiration for all of the trial participants, including defense counsel, because the juror was previously unaware of the pressures of a criminal trial. Finally, the court found that the juror had no preconceived ideas about the case before it started or when he answered Leotta's e-mail. Pet. App. 52a-53a.

3. The court of appeals affirmed. Pet. App. 1a-29a. The court rejected petitioner's claim that he was denied his Sixth Amendment right to an impartial jury.[2] The court explained that under Fourth Circuit precedent, petitioner had the burden of demonstrating that the outside juror contact involved more than an innocuous intervention. *Id.* at 27a (citing *United States* v. *Cheek*, 94 F.3d 136, 141 (4th Cir. 1996)). That showing would trigger a presumption of prejudice under *Remmer*, *supra*, and the government would then be required to prove that there was no reasonable possibility that the jury's verdict was influenced by the improper contact. Pet. App. 26a-27a.

The court of appeals concluded that the e-mail exchange between Leotta and the juror was "inadvertent and innocuous" and therefore did not trigger a presump-

[2] The court also rejected petitioner's other challenges to his conviction and sentence, none of which petitioner renews here. See Pet. App. 9a-25a.

tion of prejudice. Pet. App. 29a. The court emphasized that the subject of the e-mail exchange was the Murnaghan Foundation, not petitioner's trial, and that Leotta had made no attempt to influence the juror. Moreover, the court held, the juror's reference to petitioner's trial did not transform the nature of the exchange. *Id*. at 28a-29a.

The court of appeals also held that the district court correctly concluded that the juror was not actually biased. The court of appeals emphasized that the district court had "observed Juror #1's testimony." Pet. App. 29a. The court concluded that the district court's factual findings that the juror's e-mail expressed admiration for all of the trial's participants rather than any bias in favor of the prosecution, that the juror did not know that Leotta was a federal prosecutor, and that the juror had no preconceived notions about the case, were "reasonable given the evidence." *Ibid*.

ARGUMENT

Petitioner contends (Pet. 13-25) that this Court should grant certiorari in order to resolve disagreements in the courts of appeals about when courts should presume that a juror's outside contacts are prejudicial under *Remmer* v. *United States*, 347 U.S. 227 (1954). The courts of appeals have adopted varying approaches to the *Remmer* inquiry, but this case is not an appropriate vehicle to resolve any disagreements because petitioner would not prevail under any circuit's approach. In addition, the court of appeals' decision is correct. Further review is not warranted.

1. 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.* (citations omitted).

More recently, this Court has declined to apply a presumption of prejudice to other claims of jury irregularities. In *Smith* v. *Phillips*, 455 U.S. 209 (1982), 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." *Id.* at 215; see *id.* at 217 ("[D]ue 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."[3] *Ibid.*

[3] Petitioner contends (Pet. 16) that *Smith*'s refusal to presume prejudice was a function of the case's habeas posture. To the contrary, while the Court presumed that the state court's factual findings were correct in accordance with 28 U.S.C. 2254(d), the Court's conclusion that "due process does not require a new trial every time a juror has

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.

2. 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, cert. denied, 537 U.S. 947 (2002). Other courts of appeals tend to apply the presumption only to certain egregious 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

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been placed in a potentially compromising situation" was unqualified. *Smith*, 455 U.S. at 217.

the contact was "about the matter pending before the jury") (citation omitted), cert. denied, 552 U.S. 1260 (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); *United States* v. *Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001) (*Remmer* applies to outside contacts of a "considerably serious nature"); *United States* v. *Dutkel*, 192 F.3d 893, 895 (9th Cir. 1999) (noting that *Remmer* announced a "special rule" for jury tampering); *United States* v. *Boylan*, 898 F.2d 230, 261 (1st Cir.) ("significant" contact or "aggravated circumstances"), cert. denied, 498 U.S. 849 (1990). The Fourth Circuit requires a showing that the contact was not "innocuous" before applying the presumption. See Pet. App. 27a; *United States* v. *Cheek*, 94 F.3d 136, 141 (4th Cir. 1996). Other circuits have reserved the issue. See *United States* v. *Siegelman*, 640 F.3d 1159, 1182 n.33 (11th Cir. 2011); *United States* v. *Gartmon*, 146 F.3d 1015, 1027-1028 (D.C. Cir. 1998).

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, *e.g.*, *United States* v. *Ronda*, 455 F.3d 1273, 1299-1300 (11th Cir. 2006); *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). 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; *United States* v. *Sampson*, 486 F.3d

13, 41-42 (1st Cir. 2007); *Ronda*, 455 F.3d at 1300; *Boylan*, 898 F.2d at 261-262.

Petitioner's case does not implicate any difference in the courts of appeals' approaches to the *Remmer* presumption for two reasons. First, the court of appeals affirmed the district court's finding, after a hearing, that the contact between the juror and the Assistant United States Attorney was entirely innocuous. In such a case, it will not ordinarily make much practical difference whether the court holds that the innocuousness of the contact did not trigger the presumption or that it rebutted the presumption. Either way, the district court will have acquired a complete picture of the nature of the contact, the impact of that contact on the juror, and whether the juror was biased as a result. That is the case here, where the lower courts' conclusion that the e-mail in question was innocuous and unrelated to petitioner's trial did not turn on which party bore the burden of showing innocuousness, but instead turned on the nature of the contact itself.

Second, petitioner acknowledges (Pet. 23) that the approaches followed by the other courts of appeals are less favorable to him than the Fourth Circuit's approach, in that they apply the presumption of prejudice only in "aggravated" circumstances. Here, the Fourth Circuit held that petitioner had not made the "minimal" showing that it requires before applying the presumption, Pet. App. 25a; it therefore follows that the other courts of appeals would not apply the presumption in the circumstances presented here. Although petitioner argues (Pet. 23) that the Eleventh Circuit applies the presumption of prejudice in all circumstances and that this Court should grant review in order to adopt the Eleventh Circuit's rule, the Eleventh Circuit has in fact de-

clined to decide the circumstances in which the presumption applies. In *Ronda*, 455 F.3d at 1299 n.36, the Eleventh Circuit observed that that court has sometimes "recognized the presumption of prejudice" and sometimes stated that "prejudice is not presumed even when jurors considered extrinsic evidence," and it characterized *United States* v. *Martinez*, 14 F.3d 543 (1994), on which petitioner relies, Pet. 22, as "declin[ing] to resolve" the issue. See also *Siegelman*, 640 F.3d at 1182 n.33. 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.

3. In addition, the court of appeals' decision is correct. The courts below held that the presumption of prejudice did not apply because Leotta's e-mail contact with the juror did not concern the evidence in petitioner's trial. That conclusion is consistent with *Remmer*, which stated that the presumption arises when the juror contact concerns "the matter pending before the jury." 347 U.S. at 229. The factual finding on which the courts' conclusion was based—that the contact did not concern the trial—is not clearly erroneous. Leotta sent the juror an invoice for services rendered as an accountant for the Murnaghan fellowship. Leotta did not know that the accountant was serving as a juror at petitioner's trial, and his e-mail did not refer to the trial. The juror's mention of his jury service in his return e-mail did not change the subject of the e-mails, nor did the juror touch on the substance of the evidence at trial or the jury's deliberations.

The courts below also correctly held that the juror was not actually biased. The juror testified that he did not know Leotta personally, that he had professional

contact with Leotta only once a year, and that he thought that Leotta was a state prosecutor. It is therefore highly unlikely that Leotta's e-mail, and the juror's acquaintance with Leotta, would have influenced the juror's consideration of the evidence in this case. The juror also testified that his expressions of admiration were directed at all of the trial participants, including defense counsel, because he did not appreciate the pressures of a trial until he actually began jury service; and that he had no preconceived notions about the case when it began or in response to Leotta's e-mail. The district court was entitled to credit the juror's testimony, and petitioner has not established that the factual findings based on that testimony are clearly erroneous.

Petitioner's challenge to the court of appeals' decision is thus largely factbound, as the nature of the contacts between Leotta and the juror and the impact of those contacts on the juror's impartiality are questions of fact. See *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983); *Thompson* v. *Keohane*, 516 U.S. 99, 111 (1995). This Court ordinarily does not review facts concurred in by two courts below. *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. *E.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 504 (1987) (noting that this Court undertakes harmless error review only "sparingly").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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