No. 15-1474

In the Supreme Court of the United States

HUGH LESLIE BARAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion when it excluded evidence that petitioner paid back some of the money he owed the government after he was caught evading his taxes and defrauding the Social Security Administration.

2. Whether the district court erred in concluding that petitioner's right to an impartial jury was not violated by a juror's contact with the spouse of a colleague of one of the prosecutors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted at 624 Fed. Appx. 560. The opinions of the district court (Pet. App. 6-44, 45-55) are not published in the Federal Supplement but are available at 2014 WL 129606 and 2013 WL 6502846.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2015. A petition for rehearing was denied on February 8, 2016 (Pet. App. 7-8). Justice Kennedy extended the time within which to file a petition for a writ of certiorari until June 6, 2016, and the petition was filed on June 3, 2016. 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 Northern District of California, petitioner was convicted on one count of stealing government property, in violation of 18 U.S.C. 641, and five counts of tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 2. The district court sentenced petitioner to 30 months of imprisonment, to be followed by three years of supervised release, and it ordered petitioner to pay a fine of $7500 and restitution in the amount of $593,513.80. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1-5.

1. Petitioner, a psychologist, evaded taxes on $1.1 million in income that he received from his psychotherapy practice between 2005 and 2009. Gov't C.A. Br. 3-7. During that time period, petitioner also received disability benefits, including disability payments from the Social Security Administration (SSA), based on his false representation that he was unable to earn more than $780 per month. *Ibid.* Petitioner reported those disability benefits on the federal and state tax returns that he filed every year, and he deposited his disability checks into his bank account. *Id.* at 6-7. But he failed to report the hundreds of thousands of dollars he received each year from his patients, and he always cashed those checks rather than depositing them. *Id.* at 6. Petitioner would often deposit his disability checks and cash his patient checks on the same day, but he always made sure to cash less than $10,000 in checks on a single day, so that "nothing would be filed on him to the government." *Ibid.* (citations omitted).

a. In 2010, agents of the Internal Revenue Service (IRS) confronted petitioner over his failure to pay

taxes on the income generated by his psychotherapy practice between 2005 and 2009. Pet. C.A. Br. 4-5; Gov't C.A. Br. 8. Later that year, petitioner submitted amended returns accounting for that income, and he offered to pay the back taxes that he owed. Pet. C.A. Br. 4-5; Gov't C.A. Br. 12, 14. In 2011, petitioner was indicted on five counts of tax evasion, in violation of 26 U.S.C. 7201. Indictment 1-4.

In July 2012, IRS agents informed SSA about petitioner's income. Pet. C.A. Br. 7. SSA determined that petitioner had received over $80,000 in unearned disability benefits, and it sent petitioner a letter to that effect. *Ibid.* In August 2012, the government filed a superseding indictment that reiterated the tax-evasion charges from the original indictment and also charged petitioner with theft of the SSA disability benefits, in violation of 18 U.S.C. 641. Superseding Indictment 1-4.

In December 2012, petitioner again amended his tax returns for the relevant periods, and he paid the IRS an estimate of the amount due for back taxes. Pet. C.A. Br. 21. He also paid the SSA back for the more than $80,000 that he had improperly received in disability benefits. *Ibid.* In 2013, petitioner submitted a series of further amendments to some of the relevant tax returns, and he made further payments of back taxes and interest owed. *Id.* at 21-22.

b. Before trial, petitioner moved in limine for permission to present evidence "that he offered to pay the taxes he owed to the IRS when confronted by IRS Agents, made subsequent offers to pay his taxes and other money owed to the IRS and SSA, paid the SSA for all overpayments, and paid the IRS the amount due for the tax years in question." Pet. App. 15. Peti-

tioner argued that this evidence would help to "demonstrate his good faith and lack of criminal intent." *Ibid.*

In December 2013, the district court denied the motion on the grounds that "the evidence [petitioner] intends to offer is irrelevant under Ninth Circuit precedent." Pet. App. 16. In support, the court quoted the court of appeals' statement in *United States* v. *Pang*, 362 F.3d 1187 (9th Cir.), cert. denied, 543 U.S. 943 (2004), that "evidence of belated tax payments, made while awaiting prosecution, is irrelevant" and that "[w]ere the rule otherwise, tax evaders could avoid criminal prosecution simply by paying up after being caught." Pet. App. 16 (quoting *Pang*, 362 F.3d at 1194).

In January 2014, the district court denied petitioner's motion for reconsideration, again citing *Pang* to support its conclusion that the evidence of petitioner's payments was irrelevant. Pet. App. 47-50. In the alternative, the court also held that the evidence, even if assumed to be relevant, was inadmissible under Federal Rule of Evidence 403. Pet. App. 50. The court stated that "even assuming for the sake of argument that [petitioner's] conduct following the filing of the tax returns at issue has any relevancy to [petitioner's] intent at the time he filed the returns," petitioner's "self-serving" decision to make the payments—"after the IRS confronted him regarding his wrongdoing"—has "little, if any, probative value to his state of mind at the time he filed the returns." *Ibid.* The court concluded that "the minimal probative value, if any, of this evidence is substantially outweighed

by the danger of confusing the issues and misleading the jury." *Ibid.*[1]

c. At trial, petitioner did not dispute that he had failed to report approximately $1 million in income to the IRS between 2005 and 2009, or that he improperly continued to receive SSA disability benefits after resuming his psychotherapy practice. Pet. App. 8-9. Instead, petitioner argued that he lacked the requisite mens rea to be criminally liable for the charged crimes, asserting that he had a diminished mental capacity because of his use of various medications. *Id.* at 2. The jury rejected that defense and convicted petitioner on all counts. Gov't C.A. Br. 3.

d. After trial, but before sentencing, the government informed the district court that during the trial one of the jurors had contacted a family friend who was the wife of an Assistant United States Attorney (AUSA) who worked in the same office as one of the prosecutors in petitioner's case. Pet. C.A. Br. 70-71; Gov't C.A. Br. 45-49. Petitioner subsequently moved for a new trial and sought an evidentiary hearing. Pet. App. 67; Gov't C.A. Br. 45.

The district court held a "very lengthy" evidentiary hearing to determine whether petitioner's constitutional right to an impartial jury was violated. Pet.

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[1] The district court also rejected the contention that evidence of payment and offers to pay taxes was admissible as a basis for an expert opinion that petitioner planned to offer. Pet. App. 53-54. The court explained that petitioner had not given notice of that basis for the expert's testimony as required by federal discovery rules, see Fed. R. Crim. P. 16(b)(1)(C), and that petitioner's belated effort to supplement the expert's report to include that material "suggests that [petitioner] is attempting to find a back door through which otherwise inadmissible evidence could be proffered to the jury." Pet. App. 54.

App. 69, 74; see C.A. E.R. 255-322. The juror, the wife of the AUSA, and the AUSA all testified at the hearing. C.A. E.R. 255-322; see Gov't C.A. Br. 46-50 (summarizing hearing testimony).

The district court denied petitioner's motion for a new trial. Although the court noted that the AUSA's failure to immediately report the juror's conduct with his wife "reflects poor judgment," it concluded that petitioner's constitutional rights were not violated. Pet. App. 69. Specifically, the court found that (1) the juror never had any direct contact with any AUSA; (2) the juror never received any "extraneous information" about the case; and (3) the juror never discussed the substance of the case with the wife of the AUSA but simply wanted to discuss the trial "process" as a general matter, and especially whether the trial was "really" going to be three weeks long. *Id.* at 68-70; see Pet. C.A. Br. 66-67 (quoting an email and a text-message exchange). The court explained that "it is [petitioner's] burden to show prejudice" from the juror's improper conduct, and it noted that the assertion of prejudice "really strains credulity in this case." Pet. App. 68; see *id.* at 70-71 (again rejecting assertions of prejudice from the improper juror contacts).

The district court further held that the juror did not lie when answering "no" to a voir dire question asking whether she had "any military service or law enforcement training or any close family or friends with the same." Pet. App. 72; see Pet. 26. The court rejected petitioner's argument that the juror should have disclosed that she knew the AUSA husband of her friend, pointing out that "your average person" would not refer to AUSAs as "law enforcement" and that even petitioner's trial counsel equated "law en-

forcement" with "police officers," not government lawyers. Pet. App. 72. The district court also observed that the juror clearly "didn't want to be [t]here" and had no motive to conceal a fact that might have allowed her to "get off th[e] jury." *Id.* at 73.

2. The court of appeals affirmed. Pet. App. 1-5. With respect to the evidentiary ruling, the court agreed with the district court that "[e]vidence of late tax payments made while awaiting prosecution is irrelevant." *Id.* at 2 (citing *Pang*, 362 F.3d at 1194); see Gov't C.A. Br. 15-17 (so characterizing *Pang*). It also agreed with the district court's alternative basis for excluding petitioner's evidence of the belated payments, stating that Rule 403 permitted the exclusion of the evidence "to avoid a risk of confusing the issues and confusing the jury." Pet. App. 2 (citing *Holmes* v. *South Carolina*, 547 U.S. 319, 326 (2006)). The court emphasized that "[e]vidence of late tax payments is not particularly probative that [petitioner's] prior failure [to pay his taxes] was the result of medication." *Ibid.*

With respect to the juror misconduct, the court of appeals found "the treatment by the U.S. Attorney's Office of the contacts and attempted contacts by a juror with an [AUSA]" to be "highly troubling," and it "advise[d] the office that it would be prudent to treat any such episode in the future differently." Pet. App. 3-4. The court nonetheless "agree[d] with the assessment of the district court that [petitioner] was not prejudiced and that a new trial was not required." *Id.* at 4. The court noted that although the juror had disobeyed the court's instructions, "the juror's communications were fairly found [by the district court] to

have been innocent and unrelated to the merits of the case." *Ibid.*

ARGUMENT

Petitioner asks this Court to grant certiorari to address (1) the district court's refusal to permit him to introduce evidence that he belatedly paid his taxes after being caught evading those taxes, and (2) the court's denial of his motion for a new trial based on the juror's communications with the AUSA's wife. The court of appeals' unpublished decision correctly rejected petitioner's arguments on both issues. Further review is unwarranted.

1. Petitioner challenges the district court's exclusion of evidence that he belatedly paid his taxes after being confronted by the IRS. He argues (Pet. 22) that the court concluded that the evidence was irrelevant under *United States* v. *Pang*, 362 F.3d 1187 (9th Cir.), cert. denied, 543 U.S. 943 (2004), a decision that he interprets as establishing a categorical, per se rule that such evidence is always "irrelevant" and thus "inadmissible." According to petitioner, *Pang*'s holding is mistaken and conflicts with the decisions of other courts of appeals. Petitioner's challenge to *Pang* is not worthy of further review.

a. Although both courts below cited *Pang* as a reason to exclude petitioner's evidence, both also separately concluded that the evidence should be excluded under Federal Rule of Evidence 403. Pet. App. 2, 50. That alternative holding is correct and means that petitioner could not obtain relief even if he prevailed on his challenge to *Pang*.

Rule 403 states that a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:

unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. As this Court has made clear, Rule 403 is entirely consistent with a defendant's constitutional right "to present a complete defense." *Holmes* v. *South Carolina*, 547 U.S. 319, 324-27 (2006) (citations and internal quotation marks omitted); see *Montana* v. *Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion) (referring to Rule 403 as "familiar and unquestionably constitutional").

A court must assess "prejudice" for purposes of Rule 403 "in the context of the facts and arguments in a particular case." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 387 (2008). This Court has indicated that the case-specific analysis required by Rule 403 "is a matter first for the district court's sound judgment," insofar as it entails "an on-the-spot balancing of probative value and prejudice" that the district court is best positioned to undertake. *Id.* at 384 (citations omitted). "With respect to evidentiary questions in general and Rule 403 in particular, a district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it." *Id.* at 387. A district court has "wide discretion in determining the admissibility of evidence" under Rule 403, and a decision to exclude evidence under that rule is reviewed for abuse of discretion. *Id.* at 384 (citation and internal quotation marks omitted).

The district court in this case did not abuse its discretion in relying on Rule 403 to deny petitioner's motion to admit the evidence of his belated tax payments. As the court recognized, those payments were

"self-serving acts" that petitioner performed only "*after* the IRS confronted him regarding his wrongdoing." Pet. App. 50 (emphasis added). The payments have little bearing on petitioner's state of mind when he was evading taxes between 2005 and 2009. The court reasonably concluded that any "minimal probative value" of petitioner's subsequent-payment evidence was "substantially outweighed by the danger of confusing the issues and misleading the jury." *Ibid.* Allowing petitioner to introduce the evidence could have led the jury to acquit petitioner—even if the jury concluded that he committed the charged crimes with the requisite intent—on the improper basis that the government ultimately suffered no harm in light of the repayment. The court of appeals correctly affirmed the district court's Rule 403 analysis. See *id.* at 2.[2]

Petitioner's question presented (Pet. i.) does not encompass the lower courts' conclusion that the repayment evidence—even if relevant—was nonetheless excludable under Rule 403 based on its potential to confuse the jury. That factbound determination does not warrant this Court's review, and it provides an

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[2] Petitioner argues (Pet. 20-21) that the court of appeals failed to address his arguments that (1) the belated-payment evidence was relevant and admissible as a basis for the testimony of his expert under Federal Rule of Evidence 703, and (2) the district court erroneously concluded that he had failed to give proper notice of that the tax payments were the basis of the expert's testimony under Rule 16(b)(1)(C). The second of these issues is entirely factbound and unworthy of this Court's review. In any event, Rule 703 only permits the introduction of otherwise inadmissible evidence that formed the basis of an expert opinion if its "probative value in helping the jury evaluate the opinion substantially outweighs [its] prejudicial effect." Here, as explained above, the belated-payment evidence was unduly prejudicial.

independent basis for affirming the district court's evidentiary ruling. Thus even if petitioner could prevail on the question presented, that result would not change the outcome of this case.

b. Instead of addressing the district court's Rule 403 analysis, petitioner focuses his attention (Pet. 12-25) on the lower courts' conclusion that the repayment evidence is irrelevant under the Ninth Circuit's prior decision in *Pang*. There, the court of appeals affirmed a district court's decision to exclude evidence that the defendant had belatedly paid his taxes. 362 F.3d at 1194. The court stated that "[t]he district court correctly ruled that evidence of belated tax payments, made while awaiting prosecution, is irrelevant." *Ibid.* (citations omitted). It cited *Sansone* v. *United States*, 380 U.S. 343, 354 (1965) and *United States* v. *Ross*, 626 F.2d 77, 81 (9th Cir. 1980), for the proposition that a "subsequent intention to pay taxes is no defense to a past intention to evade taxes." *Pang*, 362 F.3d at 1194. The court went on to observe that, "[w]ere the rule otherwise, tax evaders could avoid criminal prosecution simply by paying up after being caught." *Ibid.*

While petitioner challenges *Pang*, remedial action that a taxpayer takes after he knows he is under investigation will—as a general matter—often be irrelevant. As the Seventh Circuit has explained, "subsequent remedial actions may not be probative of the defendant's prior state of mind [at the time of the misconduct] because such actions are equally consistent with (1) promptly correcting a genuine mistake and (2) trying to cover up a purposeful lie in the hope of avoiding prosecution." *United States* v. *Beavers*, 756 F.3d 1044, 1050 (2014). For that reason, many courts have excluded subsequent tax payment evi-

dence, noting its equivocal character.[3] That approach is consistent with this Court's analysis in *Sansone*, on which *Pang* relied. There, the Court held that it is no defense to tax evasion that a "defendant willfully and fraudulently understated his tax liability for the year involved but intended to report the income and pay the tax at some later time." *Sansone*, 380 U.S. at 354.

At the same time, however, courts have correctly recognized that whether evidence of belated payment is relevant in these sorts of cases must be evaluated on "a case-by-case basis." See, *e.g.*, *Beavers*, 756 F.3d at 1050; Pet. 14-16 (citing cases supporting admission of such evidence in certain circumstances). Federal Rule of Evidence 401 sets forth the "[t]est for [r]elevant [e]vidence," stating that "[e]vidence is relevant" if both (1) "it has any tendency to make a fact more or less probable than it would be without the evidence," and (2) "the fact is of consequence in determining the action." Fed. R. Evid. 401. This Court has made clear that determinations of relevance under Rule 401—just like determinations of prejudice or confusion under Rule 403—must be made "in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules." *Mendelsohn*, 552 U.S. at 387.

According to petitioner (Pet. 22), *Pang* incorrectly establishes a "per se" rule that "all belated payments

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[3] *United States* v. *Radtke*, 415 F.3d 826, 840-841 (8th Cir. 2005); *United States* v. *McClain*, 934 F.2d 822, 834-835 (7th Cir. 1991); *Ross*, 626 F.2d at 81; *Post* v. *United States*, 407 F.2d 319, 325 (D.C. Cir. 1968), cert. denied, 393 U.S. 1092 (1969); *United States* v. *Stoehr*, 196 F.2d 276, 282 (3d Cir.), cert. denied, 344 U.S. 826 (1952); see also *United States* v. *Philpot*, 733 F.3d 734, 748 (7th Cir. 2013).

of taxes after confrontation by the IRS are irrelevant and inadmissible." See Pet. 24. Whatever the merits of petitioner's claim that *Pang* imposes a strict rule that evidence of belated tax payments is always categorically irrelevant and thus inadmissible, it does not warrant review here. As noted above, the court of appeals in this case did not rely exclusively on *Pang* when rejecting petitioner's challenge to the district court's ruling, but instead held the evidence inadmissible under Rule 403, even assuming relevance. See pp. 8-11, *supra*. As a result, whether or not *Pang* was correctly decided has no bearing on the ultimate validity of petitioner's conviction. In these circumstances, no reason exists for this Court to grant certiorari to address *Pang* at this time.

2. Petitioner also contends (Pet. 26-36) that this Court should review the lower courts' rejection of his juror-misconduct claim. The district court found that the juror in question received no "extraneous information" about the case and that the juror's communications with the wife of an AUSA addressed only the trial process generally, and not the substance of the case. Pet. App. 68; see *id.* at 68-70. It thus ultimately concluded that petitioner suffered no prejudice from those communications. *Id.* at 68, 70-71. The court of appeals affirmed the district court's determinations that the juror's communications were "innocuous" and "unrelated to the merits of the case" and that petitioner "was not prejudiced." *Id.* at 4. Petitioner's various challenges to those rulings lack merit.

a. Petitioner first argues (Pet. 31) that the district court erred by failing to apply a presumption of prejudice to the juror's improper communications, contrary to this Court's decisions in *Remmer* v. *United*

States, 347 U.S. 227, 229 (1954), and *Turner* v. *Louisiana*, 379 U.S. 466 (1965), and the Ninth Circuit's decision in *Caliendo* v. *Warden*, 365 F.3d 691, 696, cert. denied, 543 U.S. 927 (2004). He is mistaken.

i. The decision below is not at odds with *Remmer*. In that case, 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 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).

As the government has previously explained, it is not clear whether or to what extent *Remmer*'s presumption of prejudice survives this Court's subsequent decisions in *Smith* v. *Phillips*, 455 U.S. 209, 215-217 (1982), and *United States* v. *Olano*, 507 U.S. 725, 737-741 (1993). See Br. in Opp. at 4-5, *Blauvelt* v. *United States*, 132 S. Ct. 111 (2011) (No. 10-1473). In *Smith*, 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 ("[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." *Ibid.*

Likewise, in *Olano*, the Court declined to apply any presumption of prejudice when alternate jurors were present during jury deliberations. 507 U.S. 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.

The courts of appeals have adopted divergent positions on the extent to which *Remmer*'s presumption of prejudice survives *Phillips* and *Olano*. See Br. in Opp. at 4-5, *Blauvelt*, *supra* (No. 10-1473). This Court has repeatedly denied certiorari to address that issue. See, *e.g.*, *Blauvelt* v. *United States*, 132 S. Ct. 111 (2011) (No. 10-1473); *Basham* v. *United States*, 560 U.S. 938 (2010) (No. 09-617); *Bradshaw* v. *United States*, 537 U.S. 1049 (2002) (No. 02-5015).

This case would not be an appropriate occasion to address that issue either. *Remmer* would not help petitioner here, for at least two independent reasons. First, by its terms, the *Remmer* presumption applies only to "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial *about the matter pending before the jury*." 347

U.S. at 229 (emphasis added). Here, however, the district court found that the communications at issue (1) did not provide the juror with any "extraneous information" about the case, and (2) related only to the trial process "generally," and not "to any of the specifics of this case." Pet. App. 68-70. The court of appeals affirmed those factual determinations, emphasizing that the communications at issue were "unrelated to the merits of the case." *Id.* at 4. In short, the communications at issue did not relate to any "matter pending before the jury," *Remmer*, 347 U.S. at 229, and they accordingly do not trigger *Remmer*'s presumption of prejudice.

Second—and in any event—the *Remmer* presumption is rebuttable. 347 U.S. at 229 (stating that presumption is "not conclusive" and may be rebutted by the government). Here, the district court found that no prejudice resulted from the juror's improper communications, and the court of appeals affirmed that conclusion. Pet. App. 4, 68, 70-71. No reason exists to grant certiorari to address *Remmer*'s continued viability in a case where the presumption would have no effect on the ultimate result.

ii. Petitioner is also wrong to argue (Pet. 30-31) that *Turner*, *supra*, supports applying a presumption of prejudice. There, this Court overturned a capital defendant's conviction because "[t]he two principal witnesses for the prosecution at the trial" were the deputy sheriffs who were in charge of the jury while they were sequestered throughout the trial. 379 U.S. at 467; see *id.* at 467-469. The Court noted that the witnesses were in "close and continual association" with the jurors throughout the trial, that they "drove the jurors to a restaurant for each meal, and to their

lodgings at night," "ate with [the jurors], conversed with them, and did errands for them. *Id.* at 468. The Court explained that "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial," insofar as the witnesses' relationship with the jury "could not but foster the juror's confidence" in their testimony. *Id.* at 473-474.

Turner thus rested on the Court's factbound conclusion that prejudice existed under the particular circumstances of that case. See 379 U.S. at 467-474. Here, unlike in *Turner*, the juror did not have any contacts with key witnesses.

iii. Petitioner's reliance (Pet. 31) on the Ninth Circuit's decision in *Caliendo*, *supra*, is also misplaced. Although petitioner cites *Caliendo* (*ibid.*) for the broad proposition that a "presumption of prejudice must be applied to a juror's contact with the prosecutor's investigating officer," the decision makes clear that the presumption comes into play only if the defendant shows that unauthorized communication is more than "*de minimis*"—*i.e.*, if it "raises a risk of influencing the verdict." 365 F.3d at 696-697. Here, the courts below found that the juror's communications were "innocuous" and "unrelated to the merits of the case," Pet. 4, and so no presumption of prejudice would have been warranted under *Caliendo*. And even if there were some possibility that the decision below conflicts with *Caliendo*, that would not be a good reason to grant further review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

b. Petitioner also argues that certiorari is warranted to resolve a purported conflict between the decision below and other courts with respect to "a [p]rosecutor's [d]uty to [i]mmediately [d]isclose [k]nown [j]ury [m]isconduct." Pet. 32; see Pet. 32-36. But there is no conflict. The lower courts in this case made clear that the prosecutors should have brought the improper juror communications to the district court's attention sooner than they did, Pet. App. 3-4, 69. They found a new trial unwarranted, however, because the communications at issue were entirely innocent and had no bearing on the outcome of the case. *Id.* at 4, 68-71.

The two decisions that petitioner cites (Pet. 35) to establish the purported split of authority are readily distinguishable. See *Williams* v. *Netherland*, 181 F. Supp. 2d 604, 617-618 (E.D. Va.) (ordering new trial when prosecutor failed to inform court of juror's prior relationships with key witness and prosecutor, resulting in "the seating of a biased juror"), aff'd 39 Fed. Appx. 830 (4th Cir. 2002); *State* v. *Cady*, 811 P.2d 1130, 1139, 1141 (Kan. 1991) (stating that "[j]uror misconduct * * * is not a ground for reversal, new trial, or mistrial unless it is shown to have substantially prejudiced a party's rights" or unless the prosecutor acted in "bad faith"). Neither of those decisions establishes a categorical rule requiring that a conviction be overturned whenever a prosecutor delays in reporting the sort of improper—but innocuous—juror communications at issue here. Further review of the juror misconduct issue is thus unwarranted.[4]

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[4] Petitioner also suggests (Pet. 32) that the Court "may wish to grant certiorari and hold this petition pending" the Court's resolution of *Pena-Rodriguez* v. *Colorado*, No. 15-606 (argued Oct. 11,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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2016). The question presented in *Pena-Rodriguez* is whether it violates the Sixth Amendment for a State to bar the introduction of juror testimony about racial bias during deliberations to impeach a jury verdict under a state analogue to Federal Rule of Evidence 606(b). Pet. Br. at i, *Pena-Rodriguez*, *supra* (No. 15-606). The court of appeals did not rely on Rule 606(b), and petitioner does not invoke that rule with respect to either of his questions presented. There is accordingly no reason to hold his petition pending the Court's resolution of *Pena-Rodriguez*.