No. ____

IN THE

Supreme Court of the United States

BRANDON LEON BASHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the jury foreperson's conduct during the penalty phase of a capital trial – which included calling three local television stations and two newspapers, seeking more publicity about the case, expressing "concern" and "fear" that her fellow jurors would not impose the death penalty, and requesting an on-camera interview after the verdict was returned – was a structural error that requires a new sentencing hearing without an independent showing of prejudice.

2. Whether the prosecution properly was required, but failed, to overcome a presumption of prejudice when the jury foreperson had lengthy phone conversations during trial with news organizations about the case and demonstrated that she was neither impartial nor disinterested, the foreperson later gave perjured testimony about those calls, and significant uncertainty remains whether the foreperson received extrajudicial information.

3. Whether, in a case involving admitted and extreme juror misconduct, the District Court improperly restricted investigation into 71 phone calls (totaling nearly 18 hours) that the jury foreperson made during trial to two other jurors, some of which occurred after the foreperson called five media outlets, because that type of inquiry might reveal "romantic relationships" between jurors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

Blank Page

PETITION FOR A WRIT OF CERTIORARI

Brandon Leon Basham ("Basham") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The March 30, 2009 opinion of the Court of Appeals is reported at 561 F.3d 302 and reprinted in the appendix to this petition ("Pet. App.") at 1a-72a. The District Court's March 14, 2005 memorandum opinion denying Basham's motion for a new trial is unpublished and reprinted at Pet. App. 73a-92a.

JURISDICTION

The Court of Appeals entered its judgment on March 30, 2009 and denied a timely petition for rehearing and rehearing en banc on June 26, 2009. Pet. App. 107a. On September 9, 2009, this Court granted an application to extend the time to file a petition for a writ of certiorari to November 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional right to an impartial jury under the Sixth Amendment, which provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

STATEMENT OF THE CASE

A. Introduction

Shortly after the jury recommended that Brandon Basham be sentenced to death, evidence surfaced that the jury foreperson had called three television stations and two newspapers during the penalty phase of the trial; had sought more publicity about the case and an "on camera interview" after the jury returned its verdict; had expressed "concern" and "fear" to the media that her fellows jurors would not impose the death penalty; had "cornered" other jurors during trial and made them uncomfortable; and had spent 18 hours on the phone with two other jurors during the guilt and penalty phases of the trial. The District Court described the foreperson's contacts with the media during trial and efforts to generate publicity as "unprecedented in the history of legal jurisprudence." Basham Hr'g Tr. 10-11, Feb. 14, 2005.

The lower courts' resolution of claims arising from these undisputed facts involves several issues about which the circuit courts are openly divided: specifically, (1) whether juror bias, prejudgment, and lack of impartiality constitute structural error or, instead, are subject to harmless error analysis; (2) whether the prosecution must overcome a presumption of prejudice upon proof that a juror has been exposed to extrajudicial contacts and, if so, how that presumption is overcome; and (3) whether all evidence of potential prejudice must be investigated before a court may conclude that the prosecution has overcome the presumption of prejudice, if it attaches.

In 2002, Basham and a co-defendant whose trial was severed, Chadrick Fulks, engaged in a two-week, multi-state crime spree that left two women dead. Basham was charged with several federal offenses in the District of South Carolina, including carjacking and kidnapping resulting in the death of Alice Donovan. The United States sought the death penalty. Basham was convicted of these and other offenses at the guilt phase of the trial, and that determination is not further challenged here. At sentencing, there was a substantial issue to be decided. The United States contended during Fulks's trial that Basham was nothing but Fulks's "puppet" during the commission of these crimes, and there was substantial evidence to support that view. And as part of his mitigation case, Basham offered evidence that he was neglected and physically and sexually abused as a child, that he suffered from a brain impairment and serious mental illness, and that he was easily influenced by others, particularly older men. Nevertheless, the jury sentenced Basham to death.

Immediately following the trial, a news producer called the prosecutor to say that she had received a call from a juror during the trial. Investigation established that during trial the jury foreperson, Cynthia Wilson, had called three local television stations and two newspapers. Most significant, in a six-minute call with the news producer from WSPA, a television station in Spartanburg, South Carolina, Wilson asked why the station was not covering the case, expressed "concern" over whether Basham would be sentenced to death because "there were jurors that were for the death penalty and others that

were not," and requested an "on-camera interview" after the jury returned its verdict.

Both the District Court and the Court of Appeals rejected claims that Wilson's conduct denied Basham of a trial by a fair and impartial jury. The Court of Appeals held that Wilson's extreme misconduct and prejudgment of the case was not a structural error in the proceedings and that Basham was required to prove prejudice. And though the court held that Basham was entitled to a presumption of prejudice because of Wilson's extrajudicial contacts, it concluded that the District Court had not abused its discretion in concluding that the prosecution had overcome that presumption. The Court of Appeals based its ruling simply on the District Court's finding that "Wilson received no substantive information during these phone calls." Pet. App. 29a. In a footnote, the Court of Appeals also ruled that the District Court had not abused its discretion by failing to investigate 71 phone calls Wilson had made to two other jurors during trial.

There is an old adage, often true, that hard cases make bad law. The crime spree in this case – described in extensive detail by the Fourth Circuit – was appalling, and two innocent women were killed and never found. But the question of whether Basham should be executed for those crimes was closely contested, and Basham was denied his right to a fair and impartial jury to decide that question. This Court will decide this Term whether Jeffrey Skilling is entitled to a new trial based on his claim that the Fifth Circuit erred in ruling that the United States had overcome a presumption that Skilling was

prejudiced by significant pretrial publicity. The Court also should consider whether Brandon Basham is entitled to a new trial because the United States could not, and did not, overcome the obvious prejudice resulting from the fact that the jury foreperson in his case repeatedly disregarded the trial court's instructions, initiated numerous contacts with local new organizations, demonstrated she had prejudged Basham's case, and sought an on-camera interview for her own glorification. As in Skilling's case, this case presents substantial issues concerning the constitutional right to a fair and impartial jury, about which there is disagreement in the lower courts. For these reasons, petitioner respectfully requests that the Court grant his petition for certiorari.

B. Factual Background and Trial

Basham was convicted of crimes he and Fulks committed after escaping from a county jail in Kentucky. Pet. App. 2a. Basham had been serving time for passing bad checks and had no history of violent crime. *See United States v. Fulks*, 454 F.3d 410, 414 (4th Cir. 2006). In contrast, Fulks – Basham's cellmate – had a history of beating and sexually assaulting women. *Id.* at 413. Following their escape, Fulks and Basham committed a string of offenses across several states, including Kentucky, Indiana, West Virginia, and South Carolina. Their actions resulted in the deaths of two women: Samantha Burns, a college student at Marshall University in West Virginia, and Alice Donovan, a 44-year old from South Carolina. Pet. App. 5a-7a. Burns was abducted from a J.C. Penney parking lot in Huntington, West Virginia. Donovan was abducted

from a Wal-Mart parking lot in Conway, South Carolina. Neither woman's body has been recovered.

Fulks was tried first. He was found guilty and sentenced to death. *Fulks*, 454 F.3d 410. During Fulks's trial, the United States contended that Fulks was "driving this train," that Basham "was a puppet," and that Fulks was "pulling [Basham's] strings throughout a lot of this crime spree." Fulks Trial Tr. 35, 53, 55, 66, June 29, 2004.

Basham's trial began after Fulks was sentenced. Basham did not deny his participation in the underlying events, but contended that he did not intend for anyone to die and that Fulks had committed the killings. The jury found Basham guilty of the charged offenses.

During the penalty phase, Basham presented evidence of his neglect and physical abuse by his parents, his sexual abuse at the hands of a family friend, his mother's use of narcotics to calm him down, and his lifelong struggles with mental illness and drugs. Pet. App. 16a-17a. Basham was treated at numerous mental institutions throughout his youth, and his IQ dropped from 101 when he was first tested at age seven to 68 when he was tested in 2003. 4th Cir. JA 2440-41. A defense expert testified that Basham suffered from a brain impairment and that his mental condition led him to be highly dependent on others, particularly older men. *Id.* at 2631.

On November 2, 2004, the jury returned a verdict sentencing Basham to death.

C. Post-Trial Proceedings

A day after the death verdict, Shannon Mays, a producer with television station WSPA, contacted the Assistant United States Attorney in charge of the case. Mays explained that an unidentified female juror in the Basham case had called her television station and that the two had spoken about the case prior to the jury's sentencing decision. *Id.* at 2851-52. The AUSA notified the District Court and defense counsel, and the court conducted a hearing at which Mays testified. The court determined that the juror involved was Cynthia Wilson, the jury foreperson; that her call with Mays lasted for six minutes; and that the call occurred during the penalty phase of the trial, prior to the close of the prosecution's rebuttal case (and hence prior to closing arguments and instructions). Pet. App. 79a.

Mays said that a female juror called the news desk, identified herself as a juror in the Basham case, and asked "why [the network] wasn't covering the case." 4th Cir. JA 2853. The juror told Mays that Basham's trial would make "good TV" because "Basham was acting up in court" and had "fallen asleep" during the trial. *Id.* The juror also asked if Mays was "familiar with the case." Mays responded that she knew of the case from having worked in Indiana near where Basham and Fulks had traveled after escaping from jail. *Id.* Mays testified that her response prompted the juror to ask more "questions about that," and that the juror's demeanor was "inquisitive." *Id.* at 2853, 2858.

Most significant, Mays testified that "there was some concern on [the juror's] 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." *Id.* at 2853. Mays later stated that the juror's "fear was that there would be issues during deliberations . . . because some were for the death penalty and others were not" and reiterated that the juror was "fearful that [the jury] would not reach a death verdict." *Id.* at 2866. Finally, Mays testified that before hanging up, the juror requested an "on camera interview" after the jury returned its verdict. *Id.* at 2854. Mays testified that she responded in words like, "Appreciate the phone call, call us when you can talk on camera." *Id.* at 2866. When asked by Mays, the juror refused to identify herself over the phone. *Id.* at 2853.

After the court's investigation ruled out two other female jurors, the court called Wilson to testify. Wilson was allowed to consult with counsel, and her attorney spoke first. He stated that he had "been counseling with her, and her mind is not completely clear right now," and that "[s]he's extremely nervous." *Id.* at 2903. Then, under oath, Wilson admitted calling WSPA and two other television stations. *Id.* at 2904. She denied doing anything else that would have violated the court's strict orders not to discuss the case during trial. *Id.* at 2909.

Wilson testified that she made the calls because of the "nature of the crime" and because she "wanted people to be aware." *Id.* at 2907. She also admitted that her husband had searched the Internet for information about Basham and his case, but she claimed that she had not discussed the case with him. *Id.* at 2909. Wilson's husband denied discussing the

case with her, but he testified that, after Wilson was selected as a juror, she was "excited about being chosen" and had told him that "this is a big opportunity for me." *Id.* at 3002.

Wilson's testimony contradicted that of Mays in several respects. The District Court expressly credited Mays over Wilson, *id.* at 3074, and the court acknowledged that it essentially had found that, among her other transgressions, Wilson had committed perjury, *id.* at 3069.

The court then tried to assess whether Wilson and other jurors had engaged in premature deliberations. Juror Shelda Richardson testified that Wilson had discussed the case during the penalty phase, *id.* at 2945, and that Wilson "had basically already had her mind made up to a certain degree," *id.* at 2970. Richardson said that Wilson would try to "feed you information to feel you out to see where you are, as far as which way you are leaning," and that she saw Wilson talking to other jurors in a similar manner. *Id.* Wilson's probing made her so "uncomfortable" that Richardson had to remind Wilson that the jurors "ha[d] to hear all the evidence in the case" before rendering a judgment. *Id.* at 2970. Wilson admitted during the post-trial hearing that she had been aware during the penalty phase that Richardson was hesitant about imposing the death penalty, *id.* at 2998-99, making her attempts to gauge and influence Richardson's views particularly troubling.

Juror June Robertson corroborated Richardson's testimony in key respects. Robertson testified that "in the jury room [Wilson] would, you know, like sit beside someone and you could see – I don't know what

they were discussing, if they were discussing the case or what. . . . But I did see her sort of corner people and talk with them." *Id.* at 2955-56.

Defense counsel then sought and obtained phone records establishing that, in addition to the three calls Wilson admitted making to local television stations, Wilson had placed calls to two local newspapers during trial that she had failed to disclose to the District Court. *Id.* at 3052. When called to testify again, Wilson claimed she did not recall those conversations. Phone records showed that all of the calls to the media outlets occurred on the same night.

The court later heard testimony from Stephanie Moore, a second news person who had spoken with Wilson during trial. Moore, a news researcher with a television station in upstate South Carolina, testified that she was familiar with Basham's case, had received a call from Wilson, and "could have said something to [Wilson] about my knowledge of the case." *Id.* at 3133. Wilson claimed not to recall any discussion with Moore. *Id.* at 3149. The court was unable to identify any employee with the third television station or the two newspapers with whom Wilson had spoken. Pet. App. 80a.

Wilson's phone records also revealed 71 phone calls between Wilson and two other female jurors during the trial, totaling almost 18 hours of conversation time. 4th Cir. JA 3234-37. There were many lengthy calls during the penalty phase of the case, including after Wilson's calls to the media. *Id.* For example, the day before penalty-phase closing arguments, and after Wilson spoke with the media

outlets, Wilson talked to a fellow juror for a total of almost two hours. *Id.* at 3237. Nevertheless, the District Court refused to investigate the content of the 71 calls, including whether Wilson had discussed her conversations with the media. The court explained, "I've [had] situations . . . where jurors form romantic relationships . . . and I'm not too sure it's anybody's business what jurors talked about." *Id.* at 3184.

The District Court regarded Wilson's calls to the media as an attempt to raise her public profile – to do "an on-camera interview after the verdict came in as the forelady of a jury in an important case." *Id.* at 2982. But the court denied Basham's motion for a new trial. Pet. App. 73a-92a. In a memorandum opinion, the court determined that Basham was entitled to a "rebuttable presumption" of prejudice under *Remmer v. United States*, 347 U.S. 227 (1954) ("*Remmer I*"), but that the Government had rebutted the presumption. Pet. App. 90a. Further, conflating all the facts present in the case to generic "misconduct," the District Court rejected Basham's claim that Wilson's actions constituted "a structural error that should not be subjected to a harmless error analysis." Pet. App. 90a.

The court did find that Wilson's actions were "a contempt of court of the highest order." Pet. App. 101a. The court noted that it had instructed the jurors on 41 occasions not to discuss the case, and it emphasized that Wilson had failed to be completely forthcoming in her testimony. Pet. App. 98a, 101a-102a. Finding that Wilson's "contumacious conduct strikes at the heart of the system of justice that we all

hold dear," the court ordered Wilson to disgorge her juror pay and to perform 120 hours of community service. Pet. App. 103a-104a. But it granted no relief to Basham.

D. Direct Appeal

Basham appealed the District Court's denial of his motion for a new trial to the Court of Appeals for the Fourth Circuit, which affirmed. Pet. App. 1a-72a.[1]

After a long presentation of the facts underlying the crimes, the court rejected in a footnote Basham's claim that Wilson's extensive misconduct and prejudgment of his case constituted a structural error that required a new sentencing hearing without further proof of "prejudice." Pet. App. 27a n.8. The court held that the error challenged by Basham was not subject to structural error analysis, and that "claims of juror misconduct and bias" are instead subject to a harmless error analysis. Pet. App. 27a n.8 (internal quotation marks omitted). Even under that standard, the court never considered whether Wilson's clear prejudgment that Basham should be executed, her expressed "concern" and "fear" to the media during trial that other jurors would not agree to impose the death penalty, and her personal interest in generating more publicity for the case and an "on camera interview" for herself, ever could be viewed as "harmless." *See* pp. 20-21, *infra* (discussing cases concluding that such harmless error analysis is impossible and inappropriate).

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[1] Basham also raised other issues that are not presented here.

The court then considered whether Wilson's extrajudicial contacts required a new trial. The court held that "Wilson's contact with the news media outlets constituted improper external communications and triggered the *Remmer I* presumption of prejudice." Pet. App. 27a. However, the court then ruled that because the District Court had made an "express finding that Wilson received no substantive information during these phone calls," the Court of Appeals could not conclude that the District Court had "abused its discretion" in denying Basham's motion for a new trial. Pet. App. 29a. The court so held despite the length of some of the calls (six and four minutes), their occurrence at a critical point in the trial, the fact that the District Court had found that Wilson had lied in her testimony and was not a credible witness about what had occurred, the fact that certain of the news persons had said that they had, or may have, provided information about the case to Wilson, the fact that no account from the news media had been obtained about three of the calls, and the fact that Wilson clearly had a personal interest in the case and sought to capitalize on her role as jury foreperson through on-camera television interviews. The Court of Appeals stated that the District Court's conclusion not to grant a new trial "may not have been inevitable, but it plainly was not an abuse of discretion." Pet. App. 31a (internal quotation marks omitted).

The Court of Appeals also relegated to a footnote Basham's claim that the District Court should have further investigated the nearly 18 hours of phone calls during trial between Wilson and two other jurors. Pet. App. 29a n.9. Citing the "broad

discretion" afforded district courts in choosing how to handle a claim of juror bias or misconduct, the Court of Appeals found no "abuse of discretion" in this case. The Court of Appeals emphasized that there was "no evidence" that Wilson informed the other jurors of the media contacts, even though it was precisely through investigation into these 18 hours of calls that such evidence might have been uncovered. The Court of Appeals did not address the District Court's rationale that it would not allow investigation into these 18 hours of calls, all of which were between three female jurors, because the court had seen situations where jurors had formed "romantic relationships."

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION BECAUSE WILSON'S BIAS, PREJUDGMENT, AND PERSONAL INTEREST CONSTITUTE STRUCTURAL ERROR, AND BECAUSE THE CIRCUITS ARE DIVIDED WHETHER SUCH JUROR BIAS CAN EVER BE HARMLESS.

The Sixth Amendment guarantees the "impartiality of any jury that will undertake capital sentencing." *Morgan v. Illinois*, 504 U.S. 719, 728 (1992). While "most constitutional errors can be harmless," *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991), the violation of "a defendant's right to an impartial adjudicator, be it judge or jury," is a structural error that compels reversal. *Rivera v. Illinois*, 129 S. Ct. 1446, 1455-56 (2009) (quoting *Gomez v. United States*, 490 U.S. 858, 876 (1989)); *see also Gray v. Mississippi*, 481 U.S. 648, 668 (1987);

Chapman v. California, 386 U.S. 18, 23 (1967); *cf. generally Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); *Tumey v. Ohio*, 273 U.S. 510 (1927). As this Court has said, a "fair trial in a fair tribunal is a basic requirement of due process," and "[f]airness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 136 (1955). Accordingly, if a biased juror "sat on the jury that ultimately sentenced petitioner to death . . . the sentence would have to be overturned." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988).

Despite ample evidence of the jury foreperson's partiality, both courts below brushed aside Basham's structural error claim with little analysis. The Court of Appeals relegated its discussion to a footnote, where it simply stated that Basham's claim of juror bias was subject to harmless error analysis. Pet. App. 27a n.8. That ruling cannot be squared with this Court's precedents, and it adds to the confusion among the circuit courts regarding the proper treatment of claims of juror bias.

1. Undisputed evidence demonstrates that Wilson prejudged Basham's case before hearing all the evidence, closing arguments, and instructions. The evidence also shows that Wilson was not disinterested and impartial because she sought to generate publicity about the case and then to bask in the media spotlight as the foreperson of the jury that delivered the death verdict. Wilson's bias and prejudgment is a structural error that compels a new sentencing hearing.

Wilson's unguarded, out-of-court statements to Mays and her pre-deliberation conduct in the jury

room reveal her prejudgment. The District Court credited Mays's testimony that Wilson expressed "concern" and "fear" that her fellow jurors "would not reach a death verdict." 4th Cir. JA 2853, 2866, 3074. Juror Richardson corroborated that conclusion, testifying that Wilson "basically already had her mind made up" during the penalty phase. *Id.* at 2970. And Wilson's probing attempts to discern Richardson's views during trial (which made Richardson "uncomfortable"), knowing that Richardson was unsure about imposing the death penalty, is further evidence of Wilson's premature judgment. *Id.* at 2970, 2998-99.

Wilson also was not impartial because she had a personal interest in the outcome of the case. Her attempts to generate additional publicity during trial and her request for an on-camera interview after the jury returned its sentencing verdict show that Wilson wanted to use her jury service as a conduit for her own media spotlight. *Id.* at 2854. Her admission to her husband upon her selection that she was "excited" and thought that jury service could be a "big opportunity" for her suggest that she had designs on such stardom from the outset. *Id.* at 3002. Her disregard of 41 explicit instructions from the court not to discuss the case, Pet. App. 98a, and the fact that she "committed perjury" when confronted with her misconduct in the post-trial hearings, 4th Cir. JA 3069, is further evidence of her bias, personal interest, and zeal to ensure that Basham received the death penalty. *Cf. Clark v. United States*, 289 U.S. 1, 10 (1933) ("Bias is to be gathered from the disingenuous concealment which kept her in the box.").

This Court long has held that "a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155 (1878). A juror who decides the case during the trial is no less biased than a juror who decides the case before the trial begins. Neither is able to "conscientiously apply the law and find the facts," *Wainwright v. Witt*, 469 U.S. 412, 423 (1985), because "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average [person]." *Irwin v. Dowd*, 366 U.S. 717, 727 (1961). Particularly in the death penalty context, a juror who does not keep an open mind until all the evidence is presented, all the arguments are made, and all the instructions are given, does not meet this Court's standard for impartiality.[2] *See, e.g., Morgan*, 504 U.S. at 728 (potential juror was not impartial because he stated he would automatically vote for the death penalty if he found the defendant guilty); *Darden v. Wainwright*, 477 U.S. 168, 178 (1986); *cf. Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) (making clear that, under the Eighth Amendment, capital juries "must be able to give meaningful consideration and effect to all mitigating evidence").

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[2] The District Court instructed the potential jurors on this precise point. *See, e.g.*, Basham Trial Tr. 293, Aug. 30, 2004 ("[W]e need to be sure that we don't put anyone on the jury who would become so prejudiced at any point during the trial that they would refuse to consider evidence from that point forward."); *id.* at 300 ("It is critically important that we select a jury that can be completely fair and open-minded and not reach a decision in the case until all of the evidence is in and after the jury has heard my instructions on the law.").

This Court has found juror bias – and ordered a new trial – on far less conclusive facts than those presented here. In *Turner v. Louisiana*, 379 U.S. 466 (1965), two deputy sheriffs who were in charge of the sequestered jury were also prosecution witnesses. Despite no evidence that the deputies spoke to the jurors about the case, and no testimony from the jurors that they were affected by the presence of the deputies, this Court overturned the conviction on Sixth Amendment grounds because "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution." *Id.* at 473.

This Court also has found juror bias on predominantly circumstantial evidence in two pre-trial publicity cases. In *Irwin*, a death penalty case, there was widespread negative news coverage of the defendant before the guilt phase began. During voir dire, eight of twelve eventual jurors stated that they thought the defendant was likely guilty, but all twelve jurors maintained that they could be fair and impartial to the defendant. 366 U.S. at 727-28 This Court discounted the jurors' claims of impartiality and ordered a new trial. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), three jurors had seen a taped confession by the defendant two months before the trial began. The jurors testified that they could "lay aside any opinion, give the defendant the presumption of innocence as provided by law, base their decision solely upon the evidence, and apply the law as given by the court." *Id.* at 732 (Clark, J., dissenting) (quoting *State v. Rideau*, 137 So. 2d 283, 295 (La. 1962)). Yet this Court ordered a new trial

without even "pausing to examine a particularized transcript of the voir dire examination" because the risk of juror bias was too severe. *Id.* at 727.[3]

As Justice O'Connor wrote, "[d]etermining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring). *Turner*, *Irwin*, and *Rideau* corroborate that assertion, as each rests its finding of juror bias on circumstantial evidence rather than on the admissions of the jurors themselves. This case is the rare one in which a juror revealed her premature judgment to an outside source, and did so in the process of trying to create a public platform for herself.

As Judge Kozinski wrote in *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc):

> The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the hope of writing a memoir or by

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[3] Although *Turner*, *Irwin*, and *Rideau* involve claims that multiple jurors were biased, a single biased juror – as in this case – undermines the impartiality of the jury. *See Morgan*, 504 U.S. at 734 n.8 ("the measure of a jury is taken by reference to the impartiality of each, individual juror"); *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) (holding that an impartial jury consists of "12, not 9 or even 10, impartial and unprejudiced jurors").

> some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.

Id. at 982.

Wilson's bias, predetermination of the case, and declared personal interest in the proceedings is a structural error based on this Court's established standards. Structural errors "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (internal quotation marks omitted). They also defy harmless error analysis because of "the difficulty of assessing the effect of the error." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006).

The Court of Appeals therefore analyzed the case improperly by concluding that "the error complained of by the defendant is not subject to structural error analysis." Pet. App. 27a n.8 (quotation marks omitted). It would be impossible for a court to assess the effect of Wilson's conduct. There is no reasoned approach a court could take to decide whether Wilson would have decided to vote for the death penalty if she had not already decided that issue prematurely. Indeed, there is no reason to presume that Wilson, the foreperson of the jury, followed *any* instructions issued by the District Court, given the brazenness of her misconduct and her attempts to conceal it. Thus, under this Court's precedents, it is impossible in this

case "to hypothesize a . . . verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). "[A] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, the wrong entity" determines the defendant's fate. *Id.* at 281 (internal quotation marks omitted).

2. The Fourth Circuit ruled in this case that "harmless error analysis has been applied to claims of juror misconduct and bias." Pet. App. 27a (internal quotation marks omitted); *see also Sherman v. Smith*, 89 F.3d 1134, 1139 (4th Cir. 1996) (en banc); *Fitzgerald v. Greene*, 150 F.3d 357, 365 (4th Cir. 1998). The First Circuit likewise has found that juror bias claims are subject to harmless error analysis. In *United States v. Tejeda*, 481 F.3d 44 (1st Cir. 2007), the defendant, Tejeda, argued that the jury was "not impartial" and that "this issue must be analyzed as structural error." *Id.* at 50. The court disagreed:

> Structural error analysis has been constricted in its use to a limited category of claimed errors, none of which fits this case. The Supreme Court has held that it is structural error for a criminal defendant to be tried before a judge who has a financial interest in convicting him. *Tumey v. Ohio*, 273 U.S. 510, 523, 535 (1927). Tejeda infers from *Tumey* that his claim that a juror is biased must also be analyzed as a structural error. This is not a situation in which one or more jurors has a financial interest in

> convicting the defendant. We reject Tejeda's argument.

Id.

Others circuits that have addressed the issue have concluded otherwise. Unlike the First Circuit – which reads *Tumey* to mean that only claims premised on a juror's financial interest in the case are subject to structural error analysis – the Ninth Circuit has held that, "[l]ike a judge who is biased . . . the presence of a biased juror introduces a structural defect not subject to harmless error analysis." *Dyer*, 151 F.3d at 973 n.2 (internal citations omitted); *see also United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000) ("[T]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.") (quotation marks omitted). The Second, Fifth, Sixth, Eighth, and Eleventh Circuits concur. *See United States v. Nelson*, 277 F.3d 164, 204 n.48 (2d Cir. 2002) (participation of a biased juror requires a new trial); *Virgil v. Dretke*, 446 F.3d 598, 607 (5th Cir. 2006) (denial of defendant's right to an impartial jury is a structural error); *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001) ("If an impaneled juror was actually biased, the conviction must be set aside."); *Johnson v. Armontrout*, 961 F.2d 748, 754 (8th Cir. 1992) ("If a defendant proves that jurors were actually biased, the conviction must be set aside."); *United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001) ("If a court determines that there was actual bias, the juror's inclusion in the petit jury is never harmless error.").

The Court should grant the petition to resolve whether Wilson's bias, prejudgment, and personal

interest compel reversal of Basham's death verdict under this Court's structural error cases.

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE CLEAR SPLITS AMONG THE CIRCUIT COURTS REGARDING THE METHOD FOR RESOLVING CLAIMS OF JUROR EXTRAJUDICIAL CONTACTS.

"In 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." *Remmer I*, 347 U.S. at 229; *see also Mattox v. United States*, 146 U.S. 140, 150 (1892) ("Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict at least unless their harmlessness is made to appear."). "[T]he burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer I*, 347 U.S. at 229.

Although the Court of Appeals properly decided that the *Remmer* presumption applied in this case, Pet. App. 27a, its determination that the prosecution had rebutted the presumption conflicts with this Court's precedents and decisions of other circuits.

1. In assessing whether the prosecution had proved that Wilson's extrajudicial contacts were harmless to Basham, the Fourth Circuit admitted that "the timing of the communication[s], right before

jury instructions, is troubling." Pet. App. 29a. But it affirmed the District Court's finding of harmlessness because the evidence did not show that Wilson "received . . . substantive information" during the calls. Pet. App. 29a.

The courts below adopted an unduly narrow conception of "prejudice" that cannot be squared with this Court's decisions, which do not require the communication of "substantive information" for an extrajudicial contact to prejudice a defendant. *Remmer* itself is to the contrary, as in that case the potential juror was exposed only to a suggestion that he might "profit" by reaching a favorable verdict. No "substantive information" about Remmer's case was involved.

Further, this Court has found that a defendant can be prejudiced simply by the influence a third party may have on a juror, independent of whether any "substantive information" was conveyed. In *Parker v. Gladden*, 385 U.S. 363 (1966), this Court found that the defendant was prejudiced when the jurors heard the bailiff call the defendant "guilty" and "wicked." *Id.* at 363-66. In *Turner*, the Court found that the continuous association between the jurors and two deputy sheriffs who served as prosecution witnesses was prejudicial to the defendant even though there was no evidence that the deputies ever spoke to the jurors about the case. 379 U.S. at 473. As this Court observed, "even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent" in the situation. *Id.* Some convictions

simply must be reversed because they are reached under "circumstances" that are "inherently suspect." *Estes v. Texas*, 381 U.S. 532, 534 (1965).

In this case, even if it was appropriate for the courts below to undertake an examination of prejudice, such prejudice is readily apparent from Wilson's contacts with external sources during trial; her determined efforts to generate publicity for the case and for herself; her "inquisitive" attempts to learn more about the case from the media outlets she contacted; her efforts to pressure other jurors to see the case her way long before deliberations had begun; and the entire "circumstances" of this case that indeed are "inherently suspect." This Court should grant the petition to address the proper treatment of the type of extrajudicial contacts at issue here.

2. The lower courts are sharply divided over the proper treatment of claims involving extrajudicial juror contacts. The courts have diverged on three issues: the continuing vitality of the *Remmer* presumption; the type of evidence needed to rebut the presumption; and the degree of investigation required by *Remmer I* and *Remmer v. United States*, 350 U.S. 377 (1956) ("*Remmer II*").[4]

a. Most circuits agree with the Fourth Circuit that the *Remmer* presumption still applies. *See United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002) ("It is well-settled that any extra-record information of which a juror becomes aware is presumed

[4] Regarding the investigation required to rebut the presumption of prejudice resulting from an extrajudicial contact, *see* Part III, *infra*.

prejudicial."); *United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007) ("When there has been improper contact with a juror or any form of jury tampering – whether direct or indirect – we apply a presumption of prejudice."); *Wisehart v. Davis*, 408 F.3d 321, 326-28 (7th Cir. 2005); *United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006).

But as the First Circuit recently observed, "[t]here is an ongoing debate in the circuits about the limits on and the ongoing vitality of the presumption of prejudice rule announced in *Remmer*." *Tejeda*, 481 F.3d at 51. Certain circuits have limited the circumstances in which the presumption applies. The Tenth Circuit requires that the extrajudicial communication refer to "the matter pending before the jury." *United States v. Robertson*, 473 F.3d 1289, 1294-95 (10th Cir. 2007) (quotations omitted). The Third Circuit applies the presumption only if the extrajudicial contacts are of a "considerably serious nature." *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001). And the Eighth Circuit does not apply the presumption unless an "extrinsic contact relates to factual evidence not developed at trial." *United States v. Rodriguez*, 414 F.3d 837, 846-47 (8th Cir. 2005); *see also United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1996) (declining to apply the presumption when the communications pertain solely to legal issues).

Four other circuits have abandoned the presumption, either expressly or impliedly. Citing *Smith v. Phillips*, 455 U.S. 209 (1982) and *United States v. Olano*, 507 U.S. 725 (1993), the Fifth and Sixth Circuits have held that the *Remmer*

presumption is no longer good law. *See United States v. Sylvester*, 143 F.3d 923, 933-34 (5th Cir. 1998) ("We agree that the *Remmer* presumption of prejudice cannot survive *Phillips* and *Olano*."); *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988) ("*Smith v. Phillips* reinterpreted *Remmer* to shift the burden of showing bias to the defendant rather than placing a heavy burden on the government to show that an unauthorized contact was harmless."). And the First Circuit and the D.C. Circuit have expressed serious doubt about the continued vitality of the presumption. *See United States v. Bradshaw*, 281 F.3d 278, 287-88 (1st Cir. 2002) (questioning *Remmer*'s force and noting that the presumption applies only "where there is an egregious tampering or third party communication which directly injects itself into the jury process") (quotation marks omitted); *United States v. Williams-Davis*, 90 F.3d 490, 496-97 (D.C. Cir. 1996) (noting that the "court has in fact not treated the supposed 'presumption' as particularly forceful" and asking "whether any particular intrusion showed enough of a 'likelihood of prejudice' to justify assigning the government a burden of proving harmlessness").

The issue is important to this case. The District Court expressly found that Wilson "committed perjury" and was not a reliable source for what she discussed with five different media outlets. Two of the calls lasted for six and four minutes, rendering it difficult to believe that Wilson was not exposed to *some* extrajudicial information or influence, even if only a reporter's quip, affirmation of Wilson's feelings, or confirmation of information Wilson had learned. And the District Court was never able to obtain *any*

account of calls to three of the media outlets from an unbiased and credible source. Thus (and laying aside Basham's claim of structural error), it matters whether the presumption of prejudice required by *Remmer* applies here. If it does, then the uncertainty that remains in the record must be borne by the government, for it is presumed that the contacts that went unexplored prejudiced Basham. In other words, it matters whether the government had to eliminate all reasonable uncertainty about whether Wilson had received external information or been exposed to external influence as a result of her extrajudicial contacts. Although the Fourth Circuit ostensibly applied the presumption, if such a "presumption" truly exists, the prosecution cannot be found to have rebutted it on this record.

b. Given the marked state of confusion over whether the *Remmer* presumption still applies, it is not surprising that there also is sharp disagreement in the circuits regarding what it takes to overcome it. Like the Fourth Circuit below, certain circuits only find that the defendant was prejudiced if there is evidence that the extrajudicial contacts provided substantive information. The Eighth Circuit requires proof that an "extrinsic contact relates to factual evidence not developed at trial." *Rodriguez*, 414 F.3d at 846.

But decisions of this Court, other federal courts (even the Fourth Circuit in previous cases), and state courts dating back to our early history have not required the transmission of substantive information to find prejudice to the defendant in cases involving improper external contacts. *See Remmer II*, 350 U.S.

at 378; *Gold v. United States*, 352 U.S. 985, 985 (1957) (reversing and remanding for a new trial under *Remmer II* when an FBI agent asked three jurors whether they had received "propaganda literature"), *facts stated in Gold v. United States*, 237 F.2d 764 (D.C. Cir. 1956); *United States v. Vasquez-Ruiz*, 502 F.3d 700, 701 (7th Cir. 2007) (juror's discovery of the word "guilty" written in her notebook warranted new trial); *United States v. Cheek*, 94 F.3d 136, 140 (4th Cir. 1996) (granting new trial where stranger drove juror to police station and bail bondsman's office, and juror saw one of the defendants, even though record was clear that no substantive information had passed); *see also Commonwealth v. M'Caul*, 3 Va. 271, 302-06 (1812) ("Although there might be and probably was no tampering with any juryman in this case . . . more good will arise from preserving the sacred principle involved in this case, than evil from granting a new trial, although in this individual instance, a verdict has probably been given by twelve men in fact unbiased by the separation.").

This Court should grant the petition to clarify whether and when a presumption of prejudice applies in cases of extrajudicial contacts, what that presumption means, and how it is overcome.

III. THE COURT SHOULD GRANT THE PETITION TO ADDRESS THE EXTENT OF INVESTIGATION NEEDED TO OVERCOME A PRESUMPTION OF PREJUDICE.

In cases in which the *Remmer* presumption applies, this Court requires lower courts to explore the "entire picture" of potential prejudice before they may conclude that a defendant has not been denied

his right to an impartial jury. *Remmer II*, 350 U.S. at 379-80. Some circuits have enforced this mandate, but in this case, the Fourth Circuit affirmed the District Court's refusal to investigate plainly relevant information on the ground that investigation of conversations between jurors might reveal "romantic relationships."

1. In a footnote, the Fourth Circuit rejected Basham's contention that the District Court failed to adequately investigate the issue of prejudice by refusing to question jurors about the 71 phone calls Wilson made to two other jurors and whether Wilson imparted extrajudicial information during those calls. Pet. App. 29a n.9. The Fourth Circuit ruled that the District Court had not abused its discretion, noting the trial court's "searching inquiry that spanned nine hearings." Pet. App. 29a n.9. The point, however, is not how many hearings it took to uncover the full extent of Wilson's misconduct, but rather whether the court conducted a complete investigation into whether Basham was prejudiced by that misconduct.

The Fourth Circuit's holding conflicts with this Court's unanimous decision in *Remmer II*. Although the District Court on remand in that case received extensive testimony from 27 witnesses, including all members of the jury, *see United States v. Remmer*, 122 F. Supp. 673, 673-74 (D. Nev. 1954), this Court found that the hearing was inadequate because it focused on too narrow an issue. *Remmer II*, 350 U.S. at 379-80. Reversing and remanding to the District Court for a new trial, this Court explained that it remanded the case in *Remmer I* because it believed "that the entire picture should be explored" and that

"the paucity of information relating to the entire situation coupled with the presumption which attaches . . . made manifest the need for a full hearing." *Id.* at 379-80. The Court chided the District Court for its overly limited approach to the issue:

> The unduly restrictive interpretation of the question by the District Court had the effect of diluting the force of all the other facts and circumstances in the case that may have influenced and disturbed Smith in the untrammeled exercise of his judgment as a juror. We hold that on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident complained of, petitioner is entitled to a new trial.

Id. at 382.

Remmer II's requirement that the lower courts investigate the "entire picture" is a corollary of the presumption applied in *Remmer I.* The prosecution must prove that the extrajudicial contacts were harmless, and so it must investigate all the ways the contacts might have prejudiced the defendant. *See, e.g., United States v. Moten*, 582 F.2d 654, 660 (2d Cir. 1978) ("It is clear that a very serious irregularity occurred during the trial of this case, and under the circumstances 'the entire picture should be explored.' . . . . After all, '[s]unlight is said to be the best of disinfectants.'") (quoting *Remmer II*, 350 U.S. at 379, and L. Brandeis, Other People's Money 62 (1933)). As with ordinary harmless error analysis, any uncertainty that remains after an incomplete investigation must be borne by the prosecution, which

has the burden of demonstrating harmlessness. "Where there is uncertainty as to the effect on the verdict, the error cannot be deemed harmless; rather, the court must treat the error as having affected the verdict." *United States v. Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998).

In light of *Remmer II*, the courts below adopted an unacceptably constrained view of the required investigation. The nearly 18 hours of phone calls between Wilson and two other jurors are particularly troubling. Those calls were plainly relevant to any investigation into Wilson's contacts with five media outlets and her premature determination of the case. Given the evidence of extreme misconduct that already had come to light (slowly, because of Wilson's lack of candor, over the course of nine hearings), there was no reasonable basis to curtail investigation into those 71 calls because it theoretically could have revealed "romantic relationships" between jurors. Even if that were a realistic concern, it would surely be outweighed by the court's obligation to ensure the reliability of a death sentence.

2. Just as there is confusion over *Remmer*, lower courts also are split on the amount of investigation they must conduct before concluding, in a case in which the *Remmer* presumption applies, that a defendant's right to an impartial jury has not been violated. Contrary to the approach the Fourth Circuit followed below, the Third and Seventh Circuits demand inquiries into all potential avenues of prejudice before denying relief. In *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993), the District Court investigated allegations of jury misconduct that

surfaced pre-verdict by requiring jurors to fill out a questionnaire. *Id.* at 686. Each juror admitted to discussing the case prior to receiving the charge, but denied forming an opinion with respect to guilt. *Id.* at 688. The District Court conducted no further inquiry, and the defendant was convicted. *Id.* The Third Circuit reversed because the District Court's investigation had failed to produce a "record one way or the other regarding prejudice to the defendants." *Id.* at 690. The court ordered a new trial. *Id.* at 695.

In *Vasquez-Ruiz*, 502 F.3d at 701, the court granted relief because the District Court failed to develop "a record [sufficient] to evaluate the degree of prejudice that had developed, and to come to a reasoned conclusion on the question whether the curative steps were adequate." *Id.* at 706. As the court explained, "[u]nder *Remmer*, the burden is on the government to rebut the presumption of prejudice from an external influence on the jury," and "[w]e see no way that the government can satisfy that burden without developing all the information." *Id.* at 705; *see also Wisehart*, 408 F.3d at 327-28 ("[I]t was the state's burden, given the juror's affidavit, to present evidence that the jury's deliberations had not been poisoned.").

Thus, in addition to the other issues presented, the Court should grant the petition and address the type of investigation that is required when a juror in a capital case calls numerous media outlets during trial, and whether that investigation may be curtailed on the ground that it may reveal conversations about "personal" matters between jurors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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