No. ____

IN THE
Supreme Court of the United States

WILLIAM TEJEDA,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JOHN TOWNSEND RICH*
Counsel of Record
DAVID J. APFEL
WILLIAM J. TRACH
JENNIFER W. FISCHESSER
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for the Petitioner

* Counsel of Record

July 2, 2007

Blank Page

QUESTIONS PRESENTED

1. Whether the rebuttable presumption of prejudice resulting from improper contact or tampering with jurors, set forth in *Remmer v. United States*, 347 U.S. 227 (1954), remains good law.

2. Whether in sentencing an individual defendant a district court may rely on the permissive presumption of reasonableness afforded any sentence within the applicable guidelines range for the offense of conviction and thereby disregard and/or deemphasize one or more of the 18 U.S.C. § 3553(a) factors—here, the factor of amenability to rehabilitation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

PETITION FOR CERTIORARI

Petitioner William Tejeda respectfully petitions for a writ of certiorari to review the judgment against him of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 481 F.3d 44 (1st Cir. 2007). The district court issued no opinion on the questions presented. The relevant pages of the sentencing transcript appear at App. 30a-33a.

JURISDICTION

The court of appeals entered its judgment on April 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment of the United States Constitution provides: "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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

2. Title 18 of the United States Code, Section 3553(a) provides:
(a) Factors To Be Considered in Imposing a Sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph

(2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

This is a case in which the defendant William Tejeda's grandfather made a threatening throat-slitting gesture toward the jury on the first day of evidence in a three week trial. The gesture was seen by two jurors, one of whom convened a meeting of all the jurors to discuss her fears and concerns regarding the gesture, and then brought the gesture to the attention of the district court. Mr. Tejeda moved for a mistrial, but his motion was denied. Ten full trial days later

Mr. Tejeda was convicted. The district court later sentenced Mr. Tejeda to 20 years in prison because of the "nature of the offense," explicitly disregarding and/or deemphasizing the fact that Mr. Tejeda (who had no prior criminal record and no prior arrests, who had a strong, supportive family, who was an active and affectionate father of two, and who had been gainfully and lawfully employed for his entire adult life) was, according to every study that has been done, a poster-child for amenability to rehabilitation.

The Court of Appeals for the First Circuit (the "First Circuit") affirmed Mr. Tejeda's conviction and sentence, holding, in accord with a minority of circuits, that the presumption of prejudice rule for improper jury contact and jury tampering announced by this Court in *Remmer v. United States*, 347 U.S. 227 (1954), did not apply. The First Circuit further held that Mr. Tejeda's guidelines sentence was reasonable.

Certiorari should be granted here because this case presents a perfect opportunity for this Court to address two issues of general applicability and import. First, the case, which is very close on its facts to *Remmer*, would permit the Court to resolve the split in the circuits regarding whether the *Remmer* presumption of prejudice remains good law. Second, the case would allow the Court to clarify whether the permissible presumption of reasonableness afforded all guideline sentences, permits district courts to disregard or deemphasize 18 U.S.C. § 3553(a) factors in sentencing an individual defendant as to whom one or more of those factors may be peculiarly applicable.

A. District Court Proceedings

Mr. Tejeda was charged in a one-count indictment, along with five co-defendants, with conspiracy to distribute, and to possess with intent to distribute, cocaine base, also known as "crack cocaine." App. 2a. During the morning recess on the

second day of trial testimony, the district court learned that two jurors had observed a man sitting in the back of the courtroom make a threatening "throat-slitting gesture" during the first day of trial. App. 5a. The individual observed to have made the gesture was Mr. Tejeda's grandfather. App. 5a. Mr. Tejeda immediately moved for a mistrial. App. 6a. The district court took the motion under advisement, and ordered both of Mr. Tejeda's grandparents, who had been seated together in the back of the courtroom, to immediately leave the courthouse and the surrounding area and not return. App. 5a. When the jurors were brought back in to the courtroom, they were instructed that a matter had been conveyed to the court and that the court had "taken care of it completely." The district court further stated: "Put it out of your mind. It has nothing to do with this case." App. 6a. Testimony resumed.

Mr. Tejeda then formalized his motion for mistrial in writing. App. 6a. The court denied the motion, but agreed, on the third day of evidence, to *voir dire* the juror who had reported observing the gesture—Juror No. 11, the jury foreperson. App. 9a. During the *voir dire*, the district court learned that Juror No. 11 had discussed the gesture with *all* of the other members of the jury. App. 7a.

The district court also learned that Juror No. 11's decision to discuss the throat-slitting gesture with her fellow jurors and ultimately to report it to the courtroom clerk were prompted by testimony linking the person who made the gesture—Mr. Tejeda's grandfather—with a red van that, according to the government's first witness, was central to the charged drug conspiracy, and which was later inextricably linked to Mr. Tejeda. App. 6a-7a. When Juror No. 11 observed the throat-slitting gesture, she found it "concerning," but said nothing. App. 7a. The next day of evidence, Juror No. 11's concerns were heightened when the government's first witness, who was still on the witness stand, pointed to Mr. Tejeda's

grandfather and testified that he had seen him in or around the red van while it was parked in front of the courthouse. Juror No. 11 reported that this testimony made her "really feel uncomfortable," and prompted her to report what she had seen to the other jurors. App. 6a-7a. Juror No. 11 further reported that her conversation with her co-jurors confirmed that at least one other juror had observed the throat-slitting gesture, and that the gesture had been a "very deliberate thing." When asked by the court whether the matter continued to concern her, Juror No. 11 responded that it was "disconcerting" to know that people in the courtroom know the jurors' names, and that "as a person you fear for yourself and your family." App. 7a.

At the conclusion of the *voir dire* of Juror No. 11, Mr. Tejeda renewed his motion for a mistrial. The district court then conducted *voir dire* of the other juror who had observed the gesture (Juror No. 6), and once again denied Mr. Tejeda's motion. App. 7a.

The next day, the district court conducted individual *voir dire* of the remaining twelve jurors. In response to the court's inquiries, at least five jurors gave specific answers indicating that they shared fears and concerns like those that had already been expressed by the foreperson, Juror No. 11:

> *Juror No. 30* – This juror stated that the gesture "puts pressure on the jury."
>
> *Juror No. 14* – This juror was left with the impression that the throat-slitting gesture had been directed *at* Juror No. 11. When asked by the court what she made of the matter, Juror No. 14 stated that she was concerned "most of all [with] the safety issue."
>
> *Juror No. 22* – This juror reported that Juror No. 11 said that the throat-slitting gesture had "looked like a deliberate motion."

Juror No. 1 – This juror stated that the individuals who observed the throat-slitting gesture said that it had been "very disconcerting." She assumed that the gesture had been made by a person known by one of the individual defendants.

Juror No. 9 – This juror reported that Juror No. 11 had explained that she had seen a person in Court make a gesture "to her." After hearing Juror No. 11's explanation, Juror No. 9 told her that she "must" report it. He also stated that he was "sure" that the incident was "unsettling" for Juror No. 11.

App. 7a-8a.

Following the jury-wide *voir dire*, Mr. Tejeda renewed his motion for a mistrial, arguing that the jurors' *voir dire* responses confirmed that his right to a fair trial had been irrevocably compromised. App. 8a. Mr. Tejeda's motion was taken under advisement, and ultimately denied. Trial continued, and Mr. Tejeda was convicted. App. 8a.

At sentencing, Mr. Tejeda's lead argument was that his unique history—no criminal record, no prior arrests, gainfully and legally employed throughout his adult life, dedicated father of two young children, part of a strong supportive family—made the likelihood of his rehabilitation particularly high, and the likelihood of his recidivism particularly low. Accordingly, he maintained that a sentence within his otherwise applicable guidelines range would be unreasonable, and greater than necessary to satisfy the purposes of punishment. Mr. Tejeda's argument was supported by studies done by the Sentencing Commission. The government did not even attempt to rebut Mr. Tejeda's position concerning his high amenability for rehabilitation. Instead, it simply asserted that Mr. Tejeda should receive a sentence at the low end of the applicable guidelines range (19 years and 7 months).

The district court sentenced Mr. Tejeda to 20 years imprisonment, above even the sentence recommended by the government. App. 31a. While the district court provided little explanation for its sentence, it did make the following statement with respect to Mr. Tejeda's argument that sentencing him within the guidelines range would insufficiently take into account his extraordinary potential for rehabilitation:

> "But your attorney is right to this extent. This sentence does not take into account rehabilitation. That's not quite right. It takes it into account, but it does not emphasize rehabilitation due to the nature of the offense." App. 32a.

This comment, while ambiguous in and of itself, is clarified by a comment made by the district court just a few days earlier in sentencing one of Mr. Tejeda's co-defendants, Christopher Custer, to a 25 year sentence:

> "Having said all that, the omission of any reference to rehabilitation is, sadly, intentional. A sentence of 25 years on an individual of your age, sir, holds out no particular prospect of rehabilitation. *And we kid ourselves if we think that sentences this long as advised by congress and the sentencing commission will in fact rehabilitate people who are sent away for such a period.*" App. 36a (emphasis added).

B. Mr. Tejeda's Appeal

On appeal, Mr. Tejeda argued that the district court's handling of the improper jury contact and jury tampering issue which arose out of the jurors' reaction to Mr. Tejeda's grandfather's throat-slitting gesture, should be analyzed under the framework set out by this Court in *Remmer v. United States*, 347 U.S. 227 (1954) (*Remmer I*). In *Remmer I*, this Court held:

> "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* . . . . The presumption is not conclusive, but the *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." *Id.* at 229 (emphasis added).

Mr. Tejeda argued that because multiple jurors expressed concern and/or fear as a result of the throat-slitting gesture, the government could not overcome the heavy burden of proving harmlessness.

As to sentencing, Mr. Tejeda argued that the district court's sentencing was unreasonable as a matter of law because, in failing to give due consideration to the 18 U.S.C. § 3553(a) factor of rehabilitation in deference to the "nature of the offense," the district court abdicated its statutory obligation to consider all § 3553(a) factors individually in crafting Mr. Tejeda's sentence.

C. First Circuit's Decision

The First Circuit began its analysis by noting that "[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*." App. 10a. The court then noted its own earlier decision in *United States v. Bradshaw*, 281 F.3d 278 (1st Cir. 2002), in which it held that "two later Supreme Court cases, *United States v. Olano*, 507 U.S. 725, 737-39 (1993), and *Smith v. Phillips*, 455 U.S. 209, 215-17 (1982), narrowed the broad language in *Remmer*." App. 11a. After distinguishing an earlier First Circuit case that had applied the *Remmer* presumption, the court held that the presumption of prejudice did not apply in this case. App. 11a-12a.

Applying an abuse of discretion standard, the court found that the district court's denial of Mr. Tejeda's motion for mistrial based on the jury tampering incident was not error.

Instead, the court found that the steps taken by the district court in the wake of the incident, including its *voir dire* of all the jurors, satisfied the procedural requirement for investigating claims of jury taint. App. 13a-14a. Placing specific emphasis on the fact that all jurors had indicated they could be fair and impartial despite their fears and concerns about the throat-slitting gesture, the court further found that the district court had not abused its discretion in determining that the jury could be impartial. App. 14a-16a.

The First Circuit's review of the reasonableness of Mr. Tejeda's sentence was terse. App. 26a-27a. It found that the district court had adequately considered the parties' arguments and adequately explained its sentence, and found the sentence to be reasonable. App. 26a-27a. Perhaps troubled by the district court's failure to properly consider rehabilitation as a factor in sentencing, the First Circuit stated in a footnote that it interpreted the district court's statement concerning rehabilitation as a *factual* finding that "given the particular's of *Tejeda*'s offense, rather than drug offenses *in general*, the court did not think rehabilitation particularly likely." App. 27a n.12 (Emphasis in original.) This interpretation of the district court's treatment of the rehabilitation issue finds no support in the record. It was not advanced as a possible interpretation by Mr. Tejeda or the government, and it was nowhere suggested by the district court.

REASONS FOR GRANTING THE PETITION

I. *Remmer* Circuit Split

A. There Is a Split In the Circuits As To the Continuing Vitality Of the *Remmer* Presumption Of Prejudice.

As the First Circuit observed, there is a split in the circuits on the question of whether *Remmer*'s presumption of

prejudice is still good law.[1] Most circuits have held that *Remmer* continues to be good law, and have routinely applied the presumption of prejudice to claims of jury taint. *See, e.g.*, *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002); *United States v. Console*, 13 F.3d 641 (3d Cir. 1993); *United States v. Lentz*, 383 F.3d 191, 219 (4th Cir. 2004); *United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1996); *United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007); *United States v. Robertson*, 473 F.3d 1289 (10th Cir. 2007); *McNair v. Campbell*, 416 F.3d 1291, 1307 (11th Cir. 2005). In contrast, the First, Fifth, and D.C. circuits have found that *Remmer*'s holding that private communications and tampering with juries are presumptively prejudicial has been effectively overruled by two subsequent cases of this Court, namely *Smith v. Phillips*, 455 U.S. 209, 215-17 (1982), and *United States v. Olano*, 507 U.S. 725, 737-39 (1993).

In *Smith*, this Court reviewed the grant of a habeas petition resulting from the fact that a juror had applied for a job with the district attorney's office while sitting on the jury. 455 U.S. at 215. The district court had conducted an inquiry and found that no actual prejudice had resulted from the juror's actions, but nonetheless "imputed bias" to the juror, and granted the petition based on the nature of the juror's conduct. This Court found that it had been improper for the district court to impute bias in the face of a finding that there had been no actual bias. Citing to long-standing precedent, the Court held that "the remedy for allegations of juror partiality is a hearing in which *the defendant has the opportunity to prove actual bias*." *Id.* (emphasis added). The courts that have found that *Smith* diminished the vitality of *Remmer* have seized on this language to hold that *Remmer*'s

---

[1] Other circuits have also acknowledged this circuit split. *See, e.g.*, *United States v. Scull*, 321 F.3d 1270, 1280 & n.5 (10th Cir. 2003); *Parker v. Head*, 244 F.3d 831, 839 (11th Cir. 2001); *United States v. Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985).

presumption of prejudice cannot apply broadly to claims of juror bias. *See, e.g.*, *United States v. Bradshaw*, 281 F.3d 278, 287 (1st Cir. 2002); *United States v. Sylvester*, 143 F.3d 923, 933-34 (5th Cir. 1998); *United States v. Williams-Davis*, 90 F.3d 490, 496 (D.C. Cir. 1996).

In *Olano*—a case which principally concerned the proper standard of review for "plain error" under Federal Rule of Civil Procedure 52(b)—this Court held that it was error for the Court of Appeals for the Ninth Circuit to find it "inherently prejudicial" that two alternate jurors were permitted to sit silently in the jury room while the actual jury deliberated, where the record included no evidence of actual prejudice. 507 U.S. at 740. The courts that have found that *Olano* compromised *Remmer* have held that this Court's rejection of the "inherently prejudicial" ruling of the Ninth Circuit signaled a retreat from the presumption of prejudice in *Remmer*. *Bradshaw*, 281 F.3d at 287; *Sylvester*, 143 F.3d at 934; *Williams-Davis*, 90 F.3d at 273.

Although the courts that have retreated from *Remmer* have all articulated the retreat differently, each has held that to the extent *Remmer*'s "presumption of prejudice" retains any vitality, it should only be applied sparingly as a matter of judicial discretion. For instance, the First Circuit in *Bradshaw*, noting that *Smith* and *Olano* had "cabined" *Remmer*, held that "the *Remmer* standard should be limited to cases of significant *ex parte* contacts with sitting jurors or those involving aggravated circumstances." 281 F.3d at 288 (quoting *United States v. Boylan*, 898 F.3d 230, 261 (1st Cir. 1990). The Fifth Circuit has held that the "*Remmer* presumption of prejudice cannot survive *Smith* and *Olano*," and as such only requires the government to prove a lack of prejudice upon a finding by the district court that prejudice is likely. *Sylvester*, 143 F.3d at 934. Finally, the D.C. Circuit, finding that *Smith* and *Olano*, "narrow[ed]" and "reconfigur[ed]" *Remmer*, has concluded that the *Remmer* presumption should only apply upon a district court's finding

that a "particular intrusion showed enough of a likelihood of prejudice to justify assigning the government a burden of proving harmlessness." *Williams-Davis*, 90 F.3d at 274. The Sixth Circuit has gone even further, holding that "*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." *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988).

Rejecting *Remmer* and shifting the burden of proof back to the defendant to prove prejudice, as the First Circuit did here, is often dispositive, and was unquestionably dispositive here. *See, e.g., United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984). *Pennell* is instructive. In *Pennell*, five jurors received anonymous phone calls urging them to find the defendant guilty, and the five jurors then discussed the phone calls with all the jurors during the next day of deliberations. *Id.* at 529. Similar to the instant case, the district court conducted individual *voir dire* of the jurors, some of whom expressed "nervousness" about or were "disturbed" by the calls. *Id.* Ultimately, as here, all jurors said they could remain impartial. *Id.* at 529-30. Relying principally on the jurors' assurances of impartiality, and ignoring *Remmer*, the district court denied defendant's motion for a new trial. *Id.* at 530. The Court of Appeals for the Sixth Circuit affirmed, acknowledging that "[w]ere *Remmer* . . . controlling, we would be hard pressed to affirm Pennell's conviction." *Id.* at 532. Finding that *Smith* had overruled the *Remmer* presumption of prejudice and that the burden was on the defendant to prove prejudice, the Sixth Circuit found that the district court had not abused its discretion in denying the defendant's new trial motion. *Id.* at 532-33. In short, *Pennell* demonstrates that the retreat from *Remmer* and its robust protection of defendants' right to be tried by a fair and impartial jury will often be dispositive. This was certainly the case here, where it was only by discarding *Remmer*, and

placing the burden firmly on Mr. Tejeda to prove actual prejudice resulting from the throat slitting incident, that the First Circuit was able to affirm the district court's denials of Mr. Tejeda's motions for a new trial.

B. This Is the Perfect Case In Which To Address the Split In the Circuits Regarding the Vitality of *Remmer*.

The facts of Mr. Tejeda's case are very similar to those in *Remmer*. As a result, this case presents the perfect opportunity to resolve the split in circuits as to the continued vitality of the presumption of prejudice. *See, e.g., Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (citing two courts reaching differing conclusions on similar facts as reason for granting *certiorari*).

In *Remmer*, a juror who later became the jury foreman had been told by an acquaintance that the juror should attempt to "make a deal" with the defendant Remmer. *Remmer v. United States*, 350 U.S. 377, 381 (1956) (*Remmer II*). The juror reported the conversation to the judge, who then notified the prosecutor, who in turn contacted the FBI. *Id.* Defense counsel was not contacted. The FBI contacted the juror, indicating that it was investigating whether his acquaintance had committed a crime. *Id.* The defendant only learned of the improper juror contact and the ensuing investigation after the trial, at which time he moved for a new trial, which the district court denied without a hearing. *Id.* at 378.

On remand after *Remmer I*, the district court held a hearing during which the "foreman of the jury testified that the events described in no way affected his state of mind or his vote in arriving at the verdict." *Remmer v. United States*, 122 F. Supp. 673, 675 (D. Nev. 1954). While one juror testified that the foreman had told her post-deliberations that he had been under "terrific pressure," the district court found that this was related to the pressure of the trial itself, and not the complained-of incident. *Id.* at 675 n.5. As a

consequence, the district court determined that "the incident referred to had no effect whatever upon the judgment, or the integrity or state of mind of the foreman of the jury," *Id.* at 675, and denied the motion for new trial.

The *Remmer II* Court reversed, holding that the circumstances of the case—the suggestion to make a deal, the subsequent FBI investigation, and the fact that the juror had stated he was under pressure—resulted in the juror being "subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." 350 U.S. at 382. As such, this Court reversed the district court's determination that the presumption of prejudice was adequately rebutted and granted the defendant a new trial. *Id.* The Court arrived at this result even though the juror had specifically testified that the events in question had "in no way affected his state of mind or his vote in arriving at the verdict." *Remmer*, 122 F. Supp. at 675.

The facts of the instant case are similar, although even more egregious, than those in *Remmer*. Here, on the first day of evidence, two jurors saw a man make a physically threatening throat-slitting gesture toward them. On the second day of evidence, when the man who made the gesture was linked by a witness to an important piece of evidence in the case, a red van in which Mr. Tejeda was alleged to have engaged in drug transactions, those jurors became so concerned that they discussed the threatening gesture with the entire jury. The district court conducted *voir dire* of the jurors, several of whom expressed "fear," "concern," or "pressure" as a result of the incident. Yet, just like the district court in *Remmer*, the district court here denied defendant's motion for a new trial because the jurors testified they could remain impartial despite their fears and concerns, and despite the pressure.

The similarity between the facts of this case and those in *Remmer*—both involved sworn juror protestations of impartiality in the face of improper, private third party contact with the jury that placed acknowledged outside pressure on the jury (just one juror in *Remmer*, versus at least six jurors here)—highlights the fact that this case affords a unique opportunity to address the split in the circuits over *Remmer*'s continued vitality. *Lynce*, 519 U.S. at 436 (citing two courts reaching differing conclusions on similar facts as reason for granting *certiorari*).

The *Remmer* Court held 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, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the 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 v. United States*, 347 U.S. 227, 229 (1954)

If *Remmer* still means what it says, namely that tampering, regardless of the identity of the tamperer,[2] with a juror during a trial about the matter pending before the jury is presumptively prejudicial, then the result in this case simply cannot stand. As in *Remmer*, the mere fact that jurors testified they could remain impartial is insufficient to rebut

---

[2] In rejecting Mr. Tejeda's *Remmer* claim, the First Circuit made much of the fact that the person doing the tampering here was a private party, affiliated with Mr. Tejeda, and not the government. App. 12a. But under *Remmer*, the presumption of prejudice applies regardless of the affiliation of the tamperer. Indeed, in *Remmer*, as here, the person doing the tampering was a friend of the defense. *Remmer II*, 350 U.S. at 381.

the presumption of prejudice. And here there is nothing else in the record to which the government or the First Circuit has pointed, or to which anyone could point, to rebut the presumption. It is only by reading *Smith* and *Olano* as having reversed *Remmer* and eliminated the presumption of prejudice that the First Circuit could affirm the district court's denial of Mr. Tejeda's motion for a mistrial.

C. The Erosion of the Right of Criminal Defendants To Trial By Jury Raises an Important Question of Law that This Court Should Remedy.

The importance of the division in the circuits concerning the continued vitality of *Remmer* cannot be overstated. The *Remmer* presumption of prejudice provided robust protections to a criminal defendant's right to trial by a fair and impartial jury. Since *Remmer*, this Court has remained vigilant in its efforts to protect against erosions in defendants' rights to an impartial jury trial. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986), and most recently *United States v. Booker*, 543 U.S. 220 (2005) ("[T]he interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly."). The minority of circuits, including the First Circuit, that have explicitly or implicitly held that the *Remmer* presumption is a dead letter have retarded defendants' jury trial rights. This case provides a perfect opportunity to correct the view of these circuits.

Mr. Tejeda was tried in the First Circuit. Had he been tried in the Third, Fourth, Ninth, Tenth, or Eleventh circuits, where *Remmer* remains good law, he would have received a new trial. That Mr. Tejeda was tried in one circuit rather than another should not be the difference between a new trial and a sentence of 20 years. The split in the circuits regarding the vitality of *Remmer* cries out to be resolved. This is the case in which to achieve the resolution.

II. *Booker* Error

A. The District Court Failed to Treat the Guidelines As Advisory As Required Under *Booker*.

The question raised by the district court's sentencing of Mr. Tejeda is whether a sentencing court may disregard or deemphasize certain 18 U.S.C. § 3553(a) factors—here, the factor of amenability to rehabilitation—in sentencing a defendant. Because doing so violates both the letter and spirit of *Booker*, this Court should grant *certiorari* in order to clarify the obligations of district courts in sentencing defendants post-*Booker*.

The principal factor Mr. Tejeda relied upon in arguing that it would be unreasonable to sentence him within the applicable guidelines range was his amenability to rehabilitation.[3] Mr. Tejeda argued that his individual circumstances pointed to a strong likelihood of rehabilitation and a low chance of recidivism, sufficient to take his case outside the heartland of cases within the applicable guideline range. The argument was strongly supported by statistical analysis *done by the Sentencing Commission itself*. Specifically, Mr. Tejeda pointed to the following Sentencing Commission findings in support of his claim that he was a terrific candidate for rehabilitation and, therefore, a person for

---

[3] Rehabilitation is one of the factors district courts must consider under 18 U.S.C. § 3553(a), and one of the principal purposes of punishment Congress intended to further in adopting the Sentencing Reform Act. *See* United States Sentencing Guidelines §1A.1, intro to comment., pt. A, ¶2 (The Statutory Mission) (Congress "foresees guidelines that will further the basic purposes of criminal punishment, *i.e.*, deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender."). Mr. Tejeda's amenability to rehabilitation also spoke to several other § 3553(a) factors, including: his "history and characteristics," 18 U.S.C. § 3553(a)(1); the need to afford adequate deterrence, 18 U.S.C. § 3553(a)(2)(B); and the need to protect the public from future crimes of the defendant, 18 U.S.C. § 3553(a)(2)(D).

whom a sentence within the heartland of the guideline range would be unreasonable:

- Individuals like Mr. Tejeda who have no prior arrests are the most empirically identifiable group of offenders who are unlikely to re-offend. *See* United States Sentencing Commission, *Recidivism and the "First Offender"* (May 2004) at 17 (available at htttp://www.ussc.gov/ research.htm).

- Individuals like Mr. Tejeda who have long-term, supportive familial relationships are less likely to recidivate. *See* United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 29 (available at http://www.ussc.gov/ research.htm).

- Individuals like Mr. Tejeda who were gainfully employed in legitimate jobs during the year prior to their arrests are far less likely to re-offend than those who were unemployed. *Id.*

- For first time offenders like Mr. Tejeda, there appears to be no correlation between length of sentence and likelihood of recidivism. *Id.* at 31.

There is no evidence to rebut these facts, and the government made no effort to do so. Indeed, the government did not even attempt to suggest that Mr. Tejeda was not an exceptional candidate for rehabilitation.

In sentencing Mr. Tejeda, the district court stated:

> "This sentence does not take into account rehabilitation. That's not quite right. It takes it into account, but it does not emphasize rehabilitation due to the nature of the offense." App. 33a.

Here, the "nature of the offense," was a "crack cocaine" conspiracy involving a significant quantity of crack cocaine. App. 2a. As in any high-quantity crack cocaine case, a guideline sentence is inevitably very long. Such sentences, as the district court observed in sentencing one of Mr. Tejeda's co-defendants, "hold[] out no particular prospect of rehabilitation." App. 37a. Indeed, as the district court further observed, "we kid ourselves if we think that sentences this long as advised by congress and the sentencing commission will in fact rehabilitate people who are sent away for such a period." *Id.* This observation, as far as it goes, is obviously correct. We do "kid ourselves" if we think that 20 year sentences, like the one imposed upon Mr. Tejeda, will serve to rehabilitate. But that is precisely why it is imperative (and mandatory under Section 3553(a) and *Booker*) that in determining a reasonable sentence, the district court look not just at the "nature of the offense," but also at the individual offender and his/her own unique characteristics.

Here, by "not emphasiz[ing]" or "not tak[ing] into account rehabilitation," because of the "nature of the offense," the district court simply deferred to the guidelines. App. 33a. It treated the applicable guideline range as mandatory, and in the process disregarded the teaching of this Court in *Booker* – namely, that the guidelines are *advisory*. 543 U.S. 245-46. The district court's reasoning appears to have been:

(i) The guidelines call for a sentence of 20-25 years.

(ii) No one can be rehabilitated if he serves 20-25 years in prison.

(iii) Therefore, I need not consider—I may deemphasize—rehabilitation as a factor in determining Mr. Tejeda's sentence.[4]

But point (iii) does not follow from points (i) and (ii). Although the guidelines are a key sentencing factor, the mandate of *Booker* is that *all* of the Section 3553(a) factors – including rehabilitation, must be considered, and not just in the abstract but as they apply to individual defendants. *Booker*, 543 U.S. at 245-46.

B. The Court Should Grant *Certiorari* in Order to Clarify the Obligations of District Courts in Sentencing Defendants Post-*Booker*.

A sentence within the applicable guidelines range is "presumptively reasonable," *Rita v. United States*, -- S. Ct. --, 2007 WL 1772146, at *6 (2007), but not mandatory. The guidelines provide the starting point for analysis, not the end. District courts, post-*Booker*, must still consider the individual Section 3553(a) factors as they apply to individual defendants, as those factors—any one of them in the particular case—may rebut the reasonableness of the presumptively permissible. Here, the district court treated the permissible as an unrebuttable mandate—at least with respect to the possibility of rehabilitation. This was error. *Certiorari* is necessary to correct the error. More broadly, *certiorari* is necessary to: (i) clarify the advisory nature of the guidelines; and (ii) explain unambiguously that the presumptive

---

[4] The First Circuit interpreted the district court's statement that the sentence does not emphasize rehabilitation due to the "nature of the offense" as a finding by the district court that "the particulars of Tejeda's offense, rather than drug offenses in general," meant that "the court did not think rehabilitation particularly likely." App. 27a n. 12. This interpretation was made up out of whole cloth. Nothing in the record supports it. To the contrary, the record makes clear the district court's view that all crack cocaine sentences "advised by congress and the sentencing commission" preclude rehabilitation. App. 36a.

reasonableness of a guidelines sentence does not and cannot absolve district courts from reviewing each and every § 3553(a) factor, *i.e.*, that the "nature of the offense" and the guidelines range advised by that nature do not trump individual offender characteristics and the other § 3553(a) factors.

Here, we have a case of the district court simply brushing aside Mr. Tejeda's legitimate argument about rehabilitation and placing the blame on Congress and the Sentencing Commission for making the guidelines range so high as to devalue rehabilitation. This is *not* the independent review of the § 3553(a) factors required by the statute and contemplated by this Court in both *Booker* and *Rita*. *See Rita*, Slip. 2007 WL 1772146 at *18 (Stevens, J., concurring) ("*Booker*'s standard of review allows—indeed, requires—district judges to consider *all* of the factors listed in §3553(a) and to apply them to the individual defendants before them."). Allowing the district court's decision against Mr. Tejeda to stand runs the risk feared by the dissenters in *Rita*, namely that the "advisory" Guidelines will become de facto mandatory, replicating the Sixth Amendment violation that *Booker* intended to remedy. *Id.* at * 32 (Souter, J., dissenting) ("But if sentencing judges attributed substantial gravitational pull to the now-discretionary Guidelines, if they treated the Guidelines result as persuasive or presumptively appropriate, the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the jury right."). Any such result must be avoided.

CONCLUSION

For the foregoing reasons, William Tejeda's petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN TOWNSEND RICH*
Counsel of Record
DAVID J. APFEL
WILLIAM J. TRACH
JENNIFER W. FISCHESSER
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for the Petitioner

July 2, 2007

*Counsel of Record

Blank Page