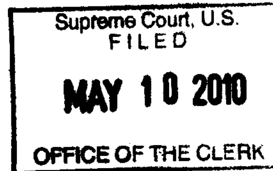

No. 09-617

IN THE

Supreme Court of the United States

BRANDON LEON BASHAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

TIMOTHY J. SULLIVAN
BRENNAN, SULLIVAN & McKENNA, LLP
6305 Ivy Lane
Suite 700
Greenbelt, MD 20770
(301) 474-0044

DAVID W. DEBRUIN
Counsel of Record
KALI N. BRACEY
ERIC R. HAREN
BHARAT RAMAMURTI*
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, DC 20001
(202) 639-6000
ddebruin@jenner.com

* Admitted in Massachusetts only; supervised by principals of the firm

Counsel for Petitioner

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REPLY BRIEF

The Government dismisses the petition as a fact-bound challenge unworthy of the Court's attention. But this case does not turn on disputed facts or contested factual findings. All parties concede that Cynthia Wilson, the jury foreperson in this federal death penalty case, engaged in extreme misconduct: in violation of 41 direct orders from the District Court, she called five media outlets during trial to drum up publicity about the case; in one call to a television station, she expressed "concern" and "fear" that her fellow jurors would not impose the death penalty, and requested an "on camera interview" after the trial; she made 71 phone calls during trial to two fellow jurors, totaling nearly 18 hours, with many clustered around her calls to the press; and she was held in contempt by the District Court. This case turns on the legal significance of these and other undisputed facts and upon clear disputes among circuit courts regarding how to analyze claims of juror bias and claims of juror extrajudicial contacts.

First, this case presents an important issue because Wilson's unprecedented misconduct proved actual bias – in that she demonstrated a personal interest in the outcome and had decided the case before the trial was concluded – and thus constituted a "structural error" requiring reversal without a showing of prejudice. Although the Fourth Circuit recognized that Petitioner made this claim, it dismissed it in a footnote, erroneously stating it was subject to harmless-error analysis, Pet. App. 27a n.8,

and concluding that no "prejudice" resulted from the juror's extrajudicial contacts, Pet. App. 28a-29a. But Petitioner's claim of juror bias and structural error, while drawing support in part from Wilson's media calls, is distinct from Petitioner's extrajudicial-contacts claim and requires a new trial. There are no factual disputes regarding this issue. The proper treatment of claims of juror bias, as evidenced by Wilson's conduct in this case, is worthy of review.

Second, as the Government concedes, the circuit courts are split on the proper treatment of extrajudicial-contacts claims. The Government argues that this case is not an appropriate vehicle to consider those divisions because the Fourth Circuit claimed to apply the presumption of prejudice articulated in *Remmer v. United States*, 347 U.S. 227 (1954). But while it played lip service to the concept, the Fourth Circuit did not in fact extend Petitioner the benefit of the presumption. Although much about Wilson's numerous calls remained unknown, the court faulted Petitioner for a failure of proof. It also applied an unduly narrow concept of "prejudice." Whether the *Remmer* presumption still exists, and if so what it means, is in dispute among the circuits, critical to this case, and worthy of review.

Third, the courts below truncated the inquiry into potential prejudice well short of the standard established in *Remmer v. United States*, 350 U.S. 377 (1956) ("*Remmer II*"). In so doing, they ensured that the content of Wilson's 71 phone calls with fellow jurors during trial remained unknown, and

denied Petitioner a chance to meet the burden that had been wrongly imposed on him in the first place.

As this Court recently held, "[f]rom beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." *Wellons v. Hall*, 130 S. Ct. 727, 728 (2010) (per curiam). The proceedings below did not meet this standard, and present Sixth Amendment issues that have divided the circuit courts. The Court's review is warranted.

ARGUMENT

1. On the first question, the Government agrees that, under this Court's precedents, "the presence of an actually biased juror is a structural error that requires automatic reversal." Opp. at 16. But both the Fourth Circuit (in this and other cases) and the First Circuit have stated that claims of juror bias are subject to harmless-error analysis. *See* Pet. App. 27a n.8; *Sherman v. Smith*, 89 F.3d 1134, 1139-40 (4th Cir. 1996) (en banc); *United States v. Tejeda*, 481 F.3d 44, 50 (1st Cir. 2007). In the Government's view, this approach conforms with this Court's and other circuits' cases because it uses harmless-error analysis to "evaluate[] the degree of prejudice resulting from the improper influence" on the juror. Opp. at 17. If that inquiry reveals actual bias, then "reversal would be constitutionally compelled." *Id.*

But the Government's reconstruction is not a fair reading of these cases. Here, the Fourth Circuit flatly ruled that juror bias is *not* structural error and, instead, is subject to "harmless error analysis"

and a consideration of prejudice. Pet. App. 27a n.8 (quotation marks omitted); *see also Tejeda*, 481 F.3d at 50. Under the Fourth Circuit's view as expressed in *Sherman*, a court must conclude that juror bias or misconduct "had substantial and injurious effect or influence in determining the jury's verdict" before granting relief. *Sherman*, 89 F.3d at 1140. Under that view, a court could conclude that a juror was actually biased, but deny relief nonetheless. *See id.* at 1142-43. Citing *Sherman*, the decision below did not even consider whether Wilson's conduct and statements proved actual bias, but instead focused on prejudice.[1] That approach is incompatible with this Court's and other circuits' cases about the treatment of actual-bias claims. *See* Pet. at 14-23.

If the courts below had considered Petitioner's actual-bias claim, the evidence was dispositive. Contrary to the Government's assertion, *see* Opp. at 17-19, Petitioner's claim is based on undisputed facts, including:

- When initially selected as a juror, Wilson told her husband, Gregory Wilson, that she was "excited" and that jury service could be a "big opportunity" for her. *See* Pet. at 9.

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[1] The facts that demonstrate Wilson's bias and prejudgment are at least as troubling as those at issue in *Wellons*, 130 S. Ct. 728-29, and the Fourth Circuit's treatment of Petitioner's structural-error arguments was just as perfunctory as the Eleventh Circuit's consideration of Wellons' juror misconduct claims. In this case, the Court could take the same approach as in *Wellons*, remanding the case for full consideration of Petitioner's structural-error claims. *Id.*

- In violation of 41 direct court orders, Wilson called five local media outlets during the penalty phase. *See id.* at 10. In one call, Wilson told Shannon Mays, a television producer, that the trial would make "good TV" because Petitioner had been "acting up"; expressed her "fear" and "concern" that other jurors would not recommend a death sentence; and requested an on-camera interview following the trial. *See id.* at 7-8.
- Wilson discussed the case with fellow jurors before the conclusion of the penalty phase and, in the mind of at least one juror, Shelda Richardson, "had basically already had her mind made up to a certain degree" about a death verdict. *See id.* at 9.
- Wilson knew that Richardson had doubts about imposing the death penalty, and, in Richardson's words, would "feed [her] information to feel . . . which way [she was] leaning." *See id.* The probing made Richardson so uncomfortable that she reminded Wilson that the jury had to "hear all the evidence in the case" before deciding on a verdict. *See id.*
- During the guilt and penalty phases, Wilson made 71 phone calls to two other jurors in the case, totaling nearly 18 hours. Many of the lengthier calls were clustered around when Wilson called the five media outlets. *See id.* at 10.
- When confronted post-trial with evidence of her phone calls to three of the five media outlets, Wilson did not mention her calls to the other

two, nor did she mention her 71 calls to fellow jurors. *See id.* at 8. She also failed to acknowledge most of the critical statements attributed to her by Mays. *Id.* at 9. The district court credited Mays' account over Wilson's. *Id.*

These facts show that Wilson was not a disinterested juror who decided Basham's fate solely on the evidence and instructions. Rather, she sought to generate publicity about the case, had thoughts of her own on-camera opportunities, and made clear through her statements to Mays and other jurors that she had decided to impose the death penalty before hearing closing arguments or the court's instructions. These facts compel a finding of bias under this Court's precedents, *see id.* at 18-19, or at least warrant review.

Contrary to the Government's claim, these facts are based on testimony that was admitted in compliance with Federal Rule of Evidence 606(b). The Rule prohibits juror testimony on "(1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the testifying juror's own mental process during the deliberations." *United States v. Ruggiero*, 56 F.3d 647, 652 (5th Cir. 1995). Thus, Mays and Gregory Wilson were free to testify because they were nonjurors. *See Tanner v. United States*, 483 U.S. 107, 127 (1987). Richardson's testimony was admissible because it concerned Wilson's pre-deliberation conduct and statements, and did not

discuss the "effect" that conduct or those statements had "upon an outcome in the deliberations." *See United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) (holding that juror testimony regarding the statements of another juror was admissible in part because the statements were made "*before* deliberations began"). And Wilson's testimony was admissible because she simply addressed the content of her phone calls to the media and her rationale for making those calls – issues that had nothing to do with the jury's deliberations and that were crucial to the court's permissible investigation into "whether extraneous prejudicial information was improperly brought to the jury's attention." Fed. R. Evid. 606(b).

2. On the second question, the Government acknowledges the divides among the circuits about the vitality and import of *Remmer v. United States*, 347 U.S. 227 (1954), but claims they are not implicated here. That is wrong, for several reasons.

The Government first argues that, because the District Court and the Fourth Circuit nominally applied the *Remmer* presumption, this case does not present the underlying question whether *Remmer* remains good law – a question about which the Government concedes the lower courts are openly divided. Opp. at 24-25. The application and import of *Remmer* are central to this case, however. If Basham ultimately prevails in this Court on *Remmer* grounds, this Court necessarily would affirm the majority-circuit rule that *Remmer* was not *sub*

silentio overruled, and reject the contrary minority view. *See* Pet. at 25-27.[2]

The Government next claims that Petitioner cannot "contend that he would have fared better under an alternative articulation of the *Remmer* framework." Opp. at 26. But it is the Fourth Circuit's failure to *apply* the presumption it articulated that squarely presents the *Remmer* issue in this case. *See Seminole Tribe v. Florida,* 517 U.S. 44, 66-67 (1996). The Fourth Circuit *reasoned* that Basham was entitled to no relief because, despite significant evidentiary gaps resulting from purported failures of recollection by Wilson and her media contacts, *see* Pet. at 10, Petitioner did not prove that the foreperson received "substantive information." Pet. at 24; Opp. at 27.

That erroneous holding implicates two related divides among the lower courts. The first concerns what the *Remmer* presumption *is*. Is it, as Seventh Circuit Judges Wood and Posner concluded, a rule under which the Government "bears the risk of uncertainty in this situation"? *United States v. Vasquez-Ruiz*, 502 F.3d 700, 705 (7th Cir. 2007) ("We read *Remmer* as holding that it is the prosecution."). Or does *Remmer* require, as the Fourth Circuit reasoned here, a defendant to *prove* that the transmission of prejudicial "substantive information" occurred? The Seventh Circuit's reading is correct

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[2] The Government argued below that *Remmer* had been overruled by subsequent cases and that Basham could only prevail by proving actual prejudice. *See* Pet. App. 84a-85a; Gov't 4th Cir. Br. at 45.

under this Court's decision in *Remmer II*. Had the Fourth Circuit adopted that approach, Petitioner would have been entitled to a new trial in light of the substantial uncertainty remaining in the record. Pet. at 27-28.

The second divide concerns whether the *Remmer* presumption can be rebutted simply with a showing that the juror did not receive any "substantive information" about the case. This Court's cases firmly say it cannot: neither *Remmer* itself, nor its successor *Gold v. United States*, 352 U.S. 985 (1957), involved transmittal of substantive information. *See* Pet. at 28-29. Many circuits, including the Seventh, have adopted that view as well. *Id.*

Indeed, it would be illogical to limit "prejudice" to the receipt of "substantive information" as the Fourth Circuit did here. A juror's external contacts, particularly with the press, can involve several other kinds of prejudice, including the creation of a personal interest, the suggestion of an outcome, or the injection of hostile community sentiment. Each such influence would be highly improper. And where, as here, the record shows that the jury foreperson had *five* conversations with the press during trial, lasting as long as *six and four minutes*, under *Remmer* it is the Government that must overcome the presumption that those kinds of influences may have occurred. *See Remmer*, 347 U.S. at 229; *cf. Irvin v. Dowd*, 366 U.S. 717, 729-30 (1961) (Frankfurter, J., concurring). That conclusion is not possible on this record. *See* Pet. at 7-10.

The Government does not attempt to dispel the clear lower-court divide on this issue. It concedes the Eighth Circuit takes essentially the view the Fourth Circuit took here, asking whether "factual evidence not developed at trial" was brought to the jury's attention. Opp. at 25 (quotation marks omitted). That narrow approach has no basis in this Court's precedents.

Further, the principle that this Court reviews harmlessness issues "sparingly," Opp. at 27, is inapplicable here. Unlike many assessments of "harmless error" or "prejudice," little is settled in the lower courts' application of *Remmer*. Opp. at 24-25; Pet. at 23-33. The Court often clarifies the law – even the law of harmless error or prejudice – in such circumstances. *See Shinseki v. Sanders*, 129 S. Ct. 1696, 1700 (2009); *Fry v. Pliler*, 551 U.S. 112 (2007).

3. On the third question, the Government defends the District Court's decision to curtail investigation into Wilson's 71 phone calls with fellow jurors by invoking the court's discretion. *See* Opp. at 28. But the Fourth Circuit's affirmance of that decision conflicts with this Court's unanimous opinion in *Remmer II*, the controlling case on this question. Pet. at 38-39. The Government does not so much as cite – let alone distinguish – that case, which holds that district courts *must* examine the "entire picture," or "all the . . . facts and circumstances," of extrajudicial contacts. 350 U.S. at 379, 382.

Even if the District Court could exercise discretion in these circumstances, limiting

investigation out of a fear of revealing romantic relationships between jurors, *see* 4th Cir. J.A. 3184, is an abuse of that discretion. This Court's cases do not tolerate foreclosing inquiry into extreme juror misconduct in a capital case on such a speculative basis. *Cf. Wellons*, 130 S. Ct. at 729-30.

The District Court's inquiry was plainly insufficient under *Remmer II*. Notwithstanding the Government's assertions, the two jurors with whom Wilson spoke on the phone *did not testify* as to whether they received any "substantive outside information" from Wilson. Opp. at 29. *See* 4th Cir. JA at 2880-86 (Doby); *id.* at 2889-96 (Hartsoe) (asking only about the identity of the juror who had called the media); Pet. App. 20a-21a (describing testimony of two female jurors from "the upstate").[3] Nor does it matter that the District Court questioned each juror – in *Remmer II*, the Court reversed and remanded even though the District Court heard the testimony of 27 witnesses, including all jurors and alternates.[4] The District Court's failure to inquire

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[3] The Fourth Circuit's decision carefully notes that neither Doby nor Hartsoe "mentioned Wilson bringing any external information to their attention." Pet. App. 21a. Neither was asked.

[4] The decision below states that other jurors did not "*mention*[] Wilson bringing any external information to their attention." Pet. App. 21a (emphasis added). In fact, for the most part, the jurors were asked *nothing* about extrajudicial material. "Most jurors were asked only some form of two questions: (1) "Do you recall any juror discussing the death penalty prior to deliberations?"; and (2) "Are you aware of anybody, including Wilson, discussing the case prematurely?" *See* 4th Cir. JA 2936-71, 2976-77. Jurors Doby and Hartsoe, called only to

into the 18 hours of conversation between Wilson and two other jurors, in the face of considerable uncertainty about Wilson's media calls, is impermissible under *Remmer II.*

The Government fails to distinguish *Vasquez-Ruiz* or *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993). Those decisions, unlike the Fourth Circuit's decision here, are faithful to *Remmer II. Vasquez-Ruiz* states that "the burden is on the government to rebut the presumption of prejudice," and that there is "no way that the government can satisfy that burden without developing all the information." 502 F.3d at 705. Judge Becker's opinion in *Resko* stands for the same principle. The district court knew that premature discussions occurred, but did not know their content or extent. *Id.* at 691. On appeal, the Third Circuit reversed, holding that the court should have fully investigated those issues. The court ordered a new trial, rather than more investigation, because questioning jurors long after trial was unlikely to resolve the uncertainty. *Id.* at 694-95. Wilson's eighteen hours of conversation with fellow jurors likewise remain unknown. That Wilson interwove them with improper calls to the media only heightens the potential prejudice, because "extra-jury influences . . . pose a far more serious threat to the defendant's right to be tried by an impartial jury." *Id.* at 707.

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identify who contacted the media, were not asked even these questions.

CONCLUSION

The petition should be granted.

Respectfully submitted,

DAVID W. DEBRUIN
Counsel of Record
KALI N. BRACEY
ERIC R. HAREN
BHARAT RAMAMURTI*
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, DC 20001
(202) 639-6000
ddebruin@jenner.com

TIMOTHY J. SULLIVAN
BRENNAN, SULLIVAN &
MCKENNA, LLP
6305 Ivy Lane
Suite 700
Greenbelt, MD 20770
(301) 474-0044

* Admitted in Massachusetts only; supervised by principals of the firm

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