No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BALTAZAR REYES, GARCIA,
ANGEL SERRANO CARRENO,
HECTOR CONTRERAS IBARRA

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JASON B. SAUNDERS
COUNSEL FOR ANGEL SERRANO CARRENO
GORDON & SAUNDERS, PLLC
1000 SECOND AVE., STE 3140
SEATTLE, WA 98104

CARLTON F. GUNN
COUNSEL FOR BALTAZAR REYES GARCIA
65 NORTH RAYMOND AVE, SUITE 320
PASADENA, CA 91103

HARRY WILLIAMS IV
COUNSEL FOR HECTOR CONTRERAS IBARRA
LAW OFFICE OF HARRY WILLIAMS
P.O. BOX 22438
SEATTLE, WA 98122

QUESTION PRESENTED

Whether a district court must hold a requested jury inquiry after a juror makes statements indicating the juror has a potential source of bias because he or she fears that defendants know the juror's identity and address.

PARTIES TO THE PROCEEDING

Petitioners are Baltazar Reyes Garcia, Angel Serrano Carreno, and Hector Contreras Ibarra, the defendants-appellants below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Baltazar Reyes Garcia, Angel Serrano Carreno, and Hector Contreras Ibarra respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

In the present case, after hearing testimony about the need for anonymity concerning confidential informants and undercover officers, a juror noticed three young men in the spectator area that seemed somehow related to the defendants. The juror asked the court whether the defendants had the jurors' personal information that was listed in juror questionnaires. Defense counsel requested a juror inquiry to determine whether the potential juror(s) could still be impartial. The court denied the request.

The Ninth Circuit Court of Appeals ruled the juror not did not present a colorable claim of juror bias based on a report of indirect coercive contact towards the juror. This decision is in conflict with a decision in the Seventh Circuit that ruled in a factually similar case that the juror's safety concern of the defendants obtaining personal information from juror questionnaires raised a colorable claim and a jury inquiry was necessary to ensure the jurors could remain impartial. The petitioners ask this Court to grant the petition for writ of certiorari to settle the conflict between circuit courts and also to settle this important question of law that occurs in district courts.

I. OPINION BELOW

In an unpublished memorandum decision, filed November 4, 2019, the United States Court of Appeals for the Ninth Circuit affirmed the sentences of Baltazar Reyes Garcia, Angel

Serrano Carreno, and Hector Contreras Ibarra. A copy of the opinion is attached as an appendix to this petition at App. A.

II. JURISDICTION

The Ninth Circuit Court of Appeals issued its opinion on November 4, 2019. App. A at 1. The Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

III. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation ...."

IV. STATEMENT OF CASE

A. Factual Background and Trial.

On October 26, 2016, the government charged Baltazar Reyes Garcia, Angel Serrano Carreno, Hector Contreras Ibarra, and 11 other individuals with Conspiracy to Distribute Controlled Substances for a five-year period that ended on October 26, 2016. App. B. That indictment was later superseded by a 41-count indictment charging the appellants and 5 other individuals with Conspiracy to Distribute Controlled Substances, for a five-year period ending November 2, 2016; multiple distribution of a controlled substance and possession of controlled substances with intent to distribute counts, possession of a firearm in furtherance of a drug trafficking offense, unlawful possession of a firearm by prohibited person, and one count of conspiracy to commit money laundering.

Within the Second Superseding Indictment, Appellant Angel Carreno was charged with

Count 1 – Conspiracy to Distribute Controlled Substances; Count 5 – Distribution of a Controlled Substance, Methamphetamine; Count 8 – Distribution of a Controlled Substance, methamphetamine (which was subsequently dismissed before trial); Count 36 – Unlawful Possession of Ammunition by Prohibited Person; Count 35 – Possession of Controlled Substances with Intent to Distribute, Heroin; Count 36 – Unlawful Possession of Ammunition by Prohibited Person; and Count 41 – Possession of Controlled Substances with Intent to Distribute a Controlled Substance, Heroin. App. C. Baltazar Reyes Garcia was charged with conspiracy to distribute controlled substances (Count 1); distribution of a controlled substance, methamphetamine (Count 5); distribution of methamphetamine (Count 6); and distribution of a controlled substance, methamphetamine (Count 9). Hector Contreras Ibarra was similarly charged with conspiracy to distribute controlled substances (Count 1) and the same three separate counts of possession with intent to deliver methamphetamine (Counts 5, 6, 9).[1]

All three co-defendants were tried together before a jury in the Western District of Washington. The defendants were found guilty on all counts. App. D. All three appealed their convictions, which were consolidated on appeal in the 9th Circuit. App. E.

B. Juror Question Concerning Whether Defendants Knew Juror Personal Information.

During the testimony on day three of the trial, jurors heard testimony about narcotics transactions, controlled buys with confidential sources. App. F 1-119. DEA Special Agent Gerrol talked about a confidential informant as well as an undercover officer assisting in the investigation of an alleged narcotics operation selling pounds of methamphetamine in

[1] Eleven other defendants were charged, but each of them pled guilty.

Washington State with ties to Canada. App. F 121-178. At the end of the day of trial, a seated juror asked in writing:

> Does the prosecution and or/defense aware of my real name, workplace, where I live? Does [*sic*] the defendants know my name, occupation, etc.?

App. G. The court discussed the issue on the record. App. F 179-180. The court recognized that the juror was expressing worry about continuing to serve without a guarantee of anonymity: "I'm going to say implicitly in that [the question] is perhaps some concern about her being known to everyone." *Id.*

The attorneys informed the court that they had returned the juror forms with the jurors' names and background information to the clerk. *Id.* The court then gave the jurors the following response:

> The attorneys have your juror form during jury selection. They are then returned to the court. They have your name and other juror form information during this limited period of time. Address of home or work not disclosed. Your name and occupation on the juror form when the attorneys have them.

App. G at 2.

The next morning, Mr. Reyes Garcia's attorney, speaking on behalf of all the defense attorneys, requested further inquiry because the juror question evidenced possible bias against the accused:

> The second question, "Does [*sic*] the defendants know my name, occupation, et cetera," is what causes particular concern. I consulted with [the other defense attorneys] about that. And we are concerned that that sort of issue may have been discussed among the jurors, that's why we're asking for the court to inquire specifically about that sort of issue. That's all.

Id. The court denied the request for jury inquiry, but agreed that the jury was concerned about their safety, because the large drug enterprise may have family members that could hurt the jurors:

> I'm going to decline to do that. I believe that the three gentlemen who sat in here yesterday raised the attention of the jury. They raised my attention. I think they may even be children, since some of them bear a striking resemblance to the defendants. And I believe it was a matter of they wanted to know who knew their juror information, and I guess specifically the question were the defendants aware of it. And that's what the court answered. So absent that, I don't see any reason to further raise the issue, which would simply raise their awareness of the fact that potentially that information would be known to these people – to the defendants as opposed to the attorneys, and caused them concern.

App. H 1, 2.

C. The Decision of the Ninth Circuit Court of Appeals.

The 9th Circuit affirmed, holding the district court did not abuse its discretion when it did not make further inquiry after receiving a note from a juror inquiring about the defendant's knowledge about the juror's information. The Court distinguished the facts from *United States v. Simtob,*[2] holding that "*Simtob* is not applicable because the note here, unlike the circumstances in *Simtob,* did not present a 'colorable claim of juror bias' based on a report of indirect coercive contact towards the juror. *Id.* at 1064 (quoting *Dyer v. Calderon,* 151 F.3d 970, 974 (9th Cir. 1998.))"

V. REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Under Rule 10, this Court may grant a petition for writ of certiorari from a circuit court of appeals decision for the following reasons:

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[2] 485 F.3d 1058 (9th Cir. 2007).

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter …;

  …

- (c) a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This case demonstrates the need for certiorari as the Ninth Circuit Court of Appeals has entered a decision in conflict with the Seventh Circuit Court of Appeals on the same important matter. This Court should also grant certiorari to decide an important question of federal law that has not been, but should be, settled by this Court.

Decisions from the Seventh and Ninth Circuit conflict over a recurring, important issue: During trial, when a juror raises a concern that, in turn, raises a concern about juror bias, does the district court have a duty to inquire further to ensure the defendants are not prejudiced by bias? In *United States v. Blitch*, 622 F.3d 658 (7th Cir. 2010), a juror inquired whether the defendant had his personal information, indicating a fear of the defendant. The Seventh Circuit Court of Appeals held that an individual inquiry was required. *Id.* at 660. In the instant case, a juror inquired whether the defendant had her personal information, indicating (as the district court recognized), a fear of the defendants. Conflicting with the Seventh Circuit in *Blitch,* the Ninth Circuit held in this case that no individual inquiry was required.

This Court should also grant certiorari to decide an important question of federal law that has not been, but should be, settled by this Court. The confusion is manifest within the Ninth Circuit, which, in an opinion written before the Seventh Circuit's *Blitch* opinion, indicated sympathy with the Seventh Circuit's position. An opinion from this Court would provide much needed clarity on an issue that arises frequently in trial courts.

A. THIS COURT SHOULD GRANT REVIEW TO ADDRESS THE SPLIT IN THE CIRCUITS CONCERNING WHEN A JUROR INQUIRY IS REQUIRED

1. The 9th Circuit Court of Appeals decision is squarely in conflict with the 7th Circuit Court of Appeals. "The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors." *Murphy v. Florida,* 421 U.S. 794, 799 (1975) (internal quotation marks and citation omitted). That principle is only satisfied when there is no biased juror actually seated at trial. *Rivera v. Illinois,* 556 U.S. 148, 159, 129 S.Ct. 1446 (2009).

To ensure that jurors are impartial and indifferent, the Ninth Circuit Court of Appeals ruled that when a juror does raise a concern that could entail juror bias, the district court must then inquire about the juror concern. *United States v. Simtob,* 485 F.34d 1058, 1064 (9th Cir. 2007). The *Simtob* Court ruled:

> A defendant has a Sixth Amendment right to "a verdict by impartial, indifferent jurors" to avoid any bias or prejudice that might affect the defendant's right to a fair trial. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc); *see also United States v. Soulard*, 730 F.2d 1292, 1305 (9th Cir. 1984). Improper influence or bias of a single juror would affect that right. *See United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). 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. *United States v. Rutherford*, 371 F.3d 634, 641 (9th Cir. 2004); *see also Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954). The burden rests on the government to rebut this presumption and to demonstrate that any alleged jury improprieties were harmless beyond a reasonable doubt. *See Rutherford*, 371 F.3d at 641; *Remmer*, 347 U.S. at 229.

Simtob, 485 F.3d at 1064.

The Court further ruled that because the potential of bias can impact a defendant's Sixth Amendment right to an impartial jury, the Court applies a presumption of prejudice and it is for

the government to rebut the presumption and show that any alleged jury improprieties were harmless beyond a reasonable doubt. 485 F.3d at 1064.

In *Simtob,* potential juror bias came to the attention of the court when a juror shared a concern that the defendant might pose a danger to him, because he thought he saw the defendant "eye-balling" him. 485 F.3d at 1060. Rather than conduct further inquiry about the juror's concern, the court merely stated that in his court neither the defendant nor anyone else could intimidate others. *Id.*

The Ninth Circuit Court of Appeals in *Simtob* ruled that was insufficient. Because the juror's peace of mind had been disturbed, the court must then presume that the defendant had been prejudiced and then it is up to the government to rebut the presumption of prejudice. *Id.* Because the district left a void in the record by not holding a hearing, the Court ruled the government could not meet its burden of rebutting the presumption of prejudice:

> From the record, we cannot discern whether [the defendant's] alleged conduct of "eye-balling" impaired the juror's ability to act impartially. The district court conducted no inquiry of the juror from which he could draw any inferences of the juror's impartiality, even though the juror claimed, during trial, that he or she *felt* that [the defendant] was staring at [him or her] in a threatening matter." (Emphasis added.) Nor did the district court consider the possibility that the juror may have communicated his or her perception of a threat to other jurors. The district court did not issue any curative instructions to the jury regarding the perceived threat, nor did it address the jury about the incident in any way. Thus, we cannot agree with the district court's apparent satisfaction that [the defendant's] Sixth Amendment rights had not been jeopardized early because [the defendant] "disavowed" any such conduct and the court previously had admonished the jury members not to make up their minds about any issue.

Id. at 1065 (citations omitted).

In the present case, a seated juror was concerned that the defendants had

information that would identify who they are, including their names, occupation, and where they lived. App. G. The court simply responded that the attorneys had the juror form during jury selection, which included the names of each juror and their individual occupations; however, their home and work addresses were not disclosed.

> The attorneys have your juror form during jury selection. They are then returned to the court. They have your name and other jury form information during this limited period of time. Address of home or work not disclosed. Your name and occupation on the juror form when the attorneys have them.

Id. at 2. The problem with such a simple response to a real safety concern expressed by a juror is threefold: 1) the response may not have mollified the juror's concerns and that juror could be biased; 2) the district court did not know how many jurors may have discussed their concerns with the juror and also could be in fear and biased; and finally 3) if even one juror felt threatened and his peace of mind disturbed, there is a presumption of prejudice which forces the government to rebut the presumption of prejudice. The court's written response to the juror does not dispel any anxiety that members of a cartel may know the names of the jurors and their occupations. Furthermore, there is no record to show that the jurors then remained impartial.

Defense counsel properly requested further inquiry because the juror question showed potential bias against the accused defendants. App. G at 2. Defense counsel also noted that the issue may have been discussed among all the jurors. *Id.* The court declined to undergo an inquiry into potential bias, stating that the court believed the jury may have been concerned about three younger men that sat in the courtroom the day before that could be children of the defendants. App. H at 1. The district court judge

found that "the three gentlemen who sat in here yesterday raised the attention of the jury. They raised my attention." *Id.* The judge who sat in the courtroom understood that the jurors were concerned for their safety and questioned whether the individual defendants knew their identifying information. *Id.*

The court indicated it believed the juror sent the note because the defendants might have identifying information and that the potential bias is supported by the timing of the note, which came after the government presented evidence that the defendants were engaged jointly in a large-scale, sophisticated and dangerous drug trafficking operation that covered the entire State of Washington and the investigation included surveillance, undercover agents, and confidential informants. A government agent testified that law enforcement protected the identity of confidential sources in order to "provide safety for them." App. I. It was the very next day that the juror asked the question about whether the defendants had identifying information about them.

But in the instant case, the Ninth Circuit ruled that the juror inquiry under *Simtob* was inapplicable, because the juror's note failed to present a "colorable claim of juror bias" based on a report of indirect coercive contact towards the juror. App. A at 8. But the Seventh Circuit Court of Appeals has ruled that *any* potential claim of juror bias, direct or indirect coercive contact, must force the court to inquire of the jury. This creates a split among the circuit courts.

In *United States v. Blitch*, 622 F.3d 658 (7th Cir. 2010), jurors expressed almost the identical concern as the present case. Jurors were concerned that their personal information contained in juror questionnaires was shared with the defendants on trial.

Id. at 662-63. Rather than inquire of individual jurors about potential bias, the Illinois district court told them not to worry. *Id.* at 663 ("I want to tell you that never in the entire history of the United States as far as I know, and I certainly, I'm quite sure of it, has there ever been, ever been an issue about juror safety"). The district court also offered to speak to jurors in private but did not require them to do so. *Id.* The Seventh Circuit Court of Appeals held that this was inadequate and error.

The Seventh Circuit recognized that an effect on "even one juror's 'peace of mind' . . . can be enough to deprive a defendant of a fair trial." *Blitch*, 622 F.3d at 665. The Seventh Circuit Court of Appeals ruled that because the jurors had expressed a real concern, it was a colorable issue and "not a case of speculation." *Id.* As such, the district court was affirmatively obligated to conduct an individualized voir dire to identify which, if any, jurors were impermissibly biased. *Id.* at 667.

The Seventh Circuit Court of Appeals *Blitch* decision is in conflict with the Ninth Circuit Court decision in the instant case. In *Blitch,* jurors expressing concern that the defendants might know their personal information from juror questionnaires was determined to rise to a "real concern," and a colorable issue. *Blitch* 622 F.3d at 665. But the Ninth Circuit Court of Appeals in direct contrast found that same juror concern that defendants might have learned the jurors' personal information from juror questionnaires was found to not rise to a "colorable claim of juror bias." App. A at 8.

This Court should settle this conflict between the circuit courts. This Court should grant review and find that when a member or members of the jury are concerned about their safety because their personal information is contained in juror questionnaires,

the district court must take that concern seriously, hold individual juror inquiries to explain what occurs with the juror questionnaires, and then ask the jurors whether they can still be impartial when determining the defendants' fate at trial. The lower court's failure to conduct individual juror questioning in the instant case was error.

B. THIS COURT SHOULD GRANT REVIEW TO ADDRESS THE REQUIREMENT OF A JUROR INQUIRY WHEN A JUROR RAISES A CONCERN THAT HE OR SHE HAS SAFETY CONCERNS ABOUT THE KNOWLEDGE DEFENDANTS MIGHT HAVE JUROR PERSONAL INFORMATION

1. When a juror raises a concern that could entail juror bias, a district court has the duty to inquire further to ensure the defendants are not prejudiced by bias. Under *Simtob,* the Ninth Circuit Court of Appeals should have reversed the district court because a juror's "peace of mind" was evidently disturbed. *Simtob* at 1060. A jury inquiry should have taken place to ensure that the jurors had no prejudice or bias against the defendants.

Unfortunately, the 9th Circuit Court of Appeals abandoned its own strong *Simtob* ruling in the current case. Rather than recognize that the juror's peace of mind had been disturbed, the Court of Appeals instead announced that *Simtob* was inapplicable because the note from the juror did not present a "colorable claim of juror bias" based on a report of indirect coercive contact towards the juror. App. A at 8, citing *Simtob,* 485 F.3d at 1064, quoting *Dyer v. Calderon,* 151 F.3d 970, 974 (9th Cir. 1998)).

This Court should grant review to determine whether a jury inquiry is necessary in such cases when a juror raises a safety issue concerning the defendants' knowledge of the jurors' personal information. Because a juror's or jurors' peace of mind may have been disturbed, only an inquiry would ensure that the sitting jury can be impartial and

fair.

In the instant case, the district court could have first inquired of the juror who asked the question, whether that concern was shared with other jurors or whether any other juror expressed a similar concern. If there was no basis to believe the concern had spread through the jury, the inquiry could end with the single juror.

There was a basis to believe that the juror feared for her safety. The juror asked the question about the defendants' knowledge of the jurors' personal information, following testimony elicited by the government that the defendants had jointly engaged in a large-scale drug trafficking operation that stretched throughout the State of Washington and into Canada. App. F 121-178. The danger posed by the operatives of the large narcotics operation necessitated special protection of the names of confidential informants as well as the undercover officers. *Id.* The juror concern was real, and presented a "colorable claim of juror bias."

Had the district court learned that the concerned juror had informed the other jurors about her fear of the defendants, the trial court must inquire individual jurors about their concerns. *See Simtob,* 485 F.3d at 1065 (noting that all of the jurors should have been questioned because of "the possibility that the juror may have communicated his or her perception of a threat to other jurors"). The district court was obligated to find out whether the concern expressed rose to the level of bias depriving the defendants of their constitutional right to trial by an impartial jury. In fact, the district court's response that went back to the jury may have raised alarm in those jurors who had not yet thought

about the defendants knowing who they were.[3] The district court could also conduct individual in camera interviews with jurors and then allow the jurors to stay only after the court is satisfied that each could serve impartially.

This Court should grant review and rule in favor of the petitioners because a juror presented the district court with a "colorable claim of juror bias," thereby requiring the court to make some inquiry of the juror, "whether through an in camera hearing or otherwise, to determine whether the allegedly affected juror was incapable of performing the juror's functions impartially." *Simtob* at 1064. In doing so, the court can also determine whether that concern was shared by other jurors.

VI. CONCLUSION

This Court should grant the petition to settle the conflict between the circuit courts and to address settle an important question of federal law concerning what measures a court must take when a juror or jurors are concerned about whether the defendants know their personal information.

Respectfully submitted this 23rd day of January, 2020.

JASON B. SAUNDERS
COUNSEL FOR ANGEL SERRANO CARRENO
GORDON & SAUNDERS, PLLC
1000 SECOND AVE SUITE 3140
SEATTLE, WA 98104

[3] *See Blitch*, 622 F.3d at 662 (describing how during the first jury selection conducted in that matter, district court realizing that juror fears regarding the dissemination of their personal information were widespread "[a]fter questioning only four of the jurors").

CARLTON F. GUNN, ATTORNEY AT LAW
COUNSEL FOR BALTAZAR REYES GARCIA
65 NORTH RAYMOND AVE, SUITE 320
PASADENA, CA 91103

HARRY WILLIAMS
ATTORNEY FOR HECTOR CONTRERAS IBARRA
LAW OFFICE OF HARRY WILLIAMS
P.O. BOX 22438
SEATTLE, WA 98122