No. 21-_____

IN THE

Supreme Court of the United States

SHELTON MARBURY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Sixth Amendment, once a defendant has presented evidence that an external influence has reached his jury, a presumption of prejudice arises, requiring the government to demonstrate that that external influence caused no harm.

PARTIES TO THE PROCEEDINGS

In addition to the parties who appear in the caption of the case on the cover page, four co-defendants were also parties in this case. They were Tommy Edelin, Earl Edelin, Henry Johnson, and Bryan Bostick.

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Shelton Marbury respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming his criminal convictions and sentence following a jury trial.

OPINIONS BELOW

The opinion of the United States Court of Appeals resolving the Sixth Amendment claim of which petitioner seeks review appears at Pet. App. 1-31 and is published at *United States v. Bostick*, 791 F.3d 127 (D.C. Cir. 2015). The ruling of the United States District Court denying petitioner relief based on the allegations of an external influence on the jury appears at Pet. App. 32-46 and is published at *United States v. Edelin*, 283 F. Supp. 2d 8 (D.D.C. 2003).

The Court of Appeals orders denying panel rehearing and rehearing en banc, entered May 26, 2021, are at Pet. App. 47-48.

JURISDICTION

The United States District Court for the District of Columbia had jurisdiction pursuant to 18 U.S.C. § 3231 and D.C. Code § 11-502(3). The Court of Appeals for the District of Columbia Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Sixth Amendment to the United States Constitution

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.

STATEMENT OF THE CASE

Petitioner Shelton Marbury (along with co-defendants Tommy Edelin, Bryan Bostick, Earl Edelin, and Henry Johnson) was charged in a superseding indictment returned on August 5, 1999, in the United States District Court for the District of Columbia with various offenses related to a large-scale drug conspiracy. According to the government, between 1985 and 1998, petitioner was a member of the conspiracy

led by Tommy Edelin to distribute powder cocaine, crack-cocaine, and heroin at discrete locations in Southeast Washington, D.C.

Petitioner was convicted of one federal drug offense: conspiracy to distribute a detectable amount of crack cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(c)); and D.C. Code offenses, including assault with intent to murder in violation of 22 D.C. Code §§ 503, 3202 and 105; murder while armed in violation of 22 D.C. Code §§ 2401, 3202 and 105; and possession of a firearm during a crime of violence in violation of D.C. Code § 22-3204(b). Petitioner was sentenced consecutively on each count for a total sentence of 145 years to life in prison.

On appeal to the D.C. Circuit, petitioner's convictions were affirmed, though the Court of Appeals ordered that the record be remanded to the district court for the limited purpose of allowing it to determine whether it would have imposed a different sentence, materially more favorable, had it been fully aware of the post-*Booker* sentencing regime. *United States v. Bostick*, 791 F.3d 127, 135 (D.C. Cir. 2015) (citing *United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005)). The court of appeals explicitly retained jurisdiction over the case. Following resolution of sentencing issues in the district court, the court of appeals affirmed petitioner's sentence and convictions on February 21, 2021.

Petitioner filed timely petitions for panel rehearing and rehearing en banc, each of which the court of appeals denied on May 26, 2021. App. 32, 33

A. Statement of Facts

Approximately eleven months after the verdicts in this case, petitioner and his co-defendants alleged instances of external influence on the jury. Petitioner alleged that the marshal with primary responsibility for the courtroom and oversight of jurors (Marshal Bradshaw) revealed to Alternate Juror 2 after she was discharged that one of petitioner's co-defendants, Bryan Bostick, had confessed to one of the charged murders. Alternate Juror 2 then recounted this information to a deliberating juror, Juror 2269. These claims of external influence were cognizable under Federal Rule of Evidence 606(b)(2), which allows for juror testimony about "extraneous prejudicial information [that] was improperly brought to the jury's attention," Fed. R. Evid. 606(b)(2)(A), as well as "an outside influence [that] was improperly brought to bear on any juror," Fed. R. Evid. 606(b)(2)(B).

The district court convened a hearing concerning these allegations at which it questioned Alternate Juror 2, who was the source of the allegations. Regarding the allegation that the marshal told her that one of the defendants had confessed to murder, Alternate Juror 2 testified:

> When we were released, the alternates, Marshal Bradshaw asked me how did I feel about the case since it is over. Well, I was released because I wasn't going to deliberate and, when he asked me that, I stated to him that – I am not sure – I kind of know how I feel but I was thinking: Why are you asking me this when I might get called back as a person to deliberate?
>
> He said: It is over now. Still I said: I don't understand why, what difference it makes, but anyway in my opinion I am not going to say I don't believe he committed the crime, but in my opinion it wasn't proven that he committed the crime. So . . . he said: Do you know that he admitted he did that? I said: Well, as far as the instructions are

> concerned, I was told that I must see where they had proven that he was guilty beyond a believable doubt and I didn't see that.

Tr. 6/27/03 at 10, 29. Alternate Juror 2 indicated the marshal made these comments during a telephone conversation. Tr. 6/27/03 at 15. Asked if she told any other juror that the marshal told her Bostick had confessed, Alternate Juror 2 answered: "I think I did say that to that particular person [Juror 2269], the female that I was speaking with," adding that "I think if I am correct it was during the time while they were deliberating." Tr. 6/27/03 at 29-30. Alternate Juror 2 further stated that she talked to Juror 2269 "maybe three times, maybe four while they were deliberating" and that she may have told Juror 2269 that she did not believe that the government had proved its case. Tr. 6/27/03 at 26-27.

The district court subsequently conducted a separate hearing at which Juror 2269 testified. Juror 2269 initially testified that she did not recall having any telephone conversations with Alternate Juror 2 during deliberations, although she did "remember exchanging numbers with her." Tr. 7/11/03 at 6. She also initially recalled speaking with Alternate Juror 2 only "the day after the verdict . . . or that evening." Tr. 7/11/03 at 8, 14. Juror 2269 testified: "I believe she was here in the courtroom and she was upset because she felt that she should have remained on the jury until the verdict was read." Tr. 7/11/03 at 6, 8. The district court inquired if Alternate Juror 2 had revealed "her views on the case" and after a pause, Juror 2269 answered, "To be really honest, she may have, but I don't remember what those views were . . . . It's almost a year and a half ago, and I really don't." Tr. 7/11/03 at 7-8. When the court asked Juror 2269 if Alternate Juror 2 told her that "any defendant

had ever made a statement to the police or made any admission . . . that one of the defendants had confessed?" the juror responded, "Absolutely not . . . . She never said that to me." Tr. 7/11/03 at 8, 9. When the court asked whether Juror 2269 believed she would recall if such a statement had been made to her, she replied, "I think so." Tr. 7/11/03 at 9. Juror 2269 subsequently admitted that it "may be true" that she spoke with Alternate Juror 2 during the time period that the jury was deliberating, but the conversations were "personal in nature." Tr. 7/11/03 at 14-15. The defense subsequently requested investigation of other jurors, questioning of the marshal, and a subpoena of Alternate Juror 2's phone records to show that she communicated at length with Juror 2269 during deliberations.

B. Opinions in Courts Below.

1. District Court Decision.

The district court denied petitioner's requests for further investigation and for any other relief in a Memorandum Opinion and Order issued September 16, 2003. *See United States v. Edelin*, 283 F. Supp. 2d 8, 10, 24-25 (D.D.C. 2003). The district court ruled that Alternate Juror 2's allegations were not sufficiently credible to merit further investigation. *Id.* at 17, 19, 24. The court further concluded there was "no evidence of any impact the alleged communication had on the jury." *Id.* at 20. Apparently because the court determined that no misconduct had occurred, it conducted no prejudice inquiry, and instead commented that in a similar case the D.C. Circuit found "no prejudice in part because 'the evidence against defendants was overwhelming.'" *Id.* at 15 (citing *United States v. Williams-Davis*, 90 F.3d 490, 497

(D.C. Cir. 1996)). The district court similarly ruled the evidence against petitioner and his co-defendants was "overwhelming." *Id.*

2. Court of Appeals Decision.

The court of appeals held that the district court did not abuse its discretion in how it investigated the allegations of juror misconduct and that the district court's factual findings were "entitled to great weight." *Bostick*, 791 F.3d at 153. The court further ruled that the district court provided a "well-supported determination that the alleged improper juror activity did not occur." *Id.* at 155. As a result, the court had no occasion to assess potential prejudice arising from the alleged external contacts and address the district court's failure to assess potential prejudice.

REASON FOR GRANTING THE PETITION

The Court should reaffirm that the presumption of prejudice first recognized in *Remmer v. United States* applies when an external influence has reached a jury in a criminal trial and reconcile the competing standards amongst circuit courts for deciding whether a defendant's Sixth Amendment right to an impartial jury has been violated.

When an external contact reaches a juror during a criminal trial, a presumption arises that the defendant's Sixth Amendment right to an impartial jury has been impacted. *Remmer v. United States,* 347 U.S. 227, 229 (1954). In *Remmer*, this Court evaluated two external communications with a juror, the first by an unnamed individual promising a financial incentive if a verdict favorable to the defendant were rendered, and the second by the FBI's investigation of the initial contact. This Court unequivocally announced that "*any* private communication, contact, or tampering directly or indirectly, with a juror during a trial about the

matter pending before the jury is … deemed presumptively prejudicial." *Id.* (emphasis added). The Court further clarified that "the presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and a hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.* Thus, *Remmer* established that as a matter of due process, a defendant has a right to a hearing to present evidence of external contact with a juror after which the government must prove that the contacts were not prejudicial. *Id.* at 230; *see also Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." (citing *Remmer*, 347 U.S. 227)). In explaining the relationship between evidence of an external contact and its likely impact on a jury, this Court has observed that "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *United States v. Olano*, 507 U.S. 725, 739 (1993).

Since *Remmer*, courts of appeals have developed varying views on whether a presumption of prejudice should apply when investigating allegations of an external influence on a jury. The D.C. Circuit is among Circuits that do not apply a presumption of prejudice and grant broad discretion for trial courts to resolve questions of improper jury contacts. *See Williams-Davis*, 90 F.3d at 498 ("[C]ases say clearly that the trial court has broad discretion over the 'methodology' of inquiries into third-party contacts with jurors[.]" (citing *United States v. Williams*, 822 F.2d

1174, 1190 (D.C. Cir. 1987))); *see also Williams*, 822 F.2d at 1189-90 ("[T]he trial court should have considerable latitude in determining the methodology to be employed."). The D.C. Circuit has held that so long as the district court makes enough of an inquiry to lead to a "reasonable judgment that there has been no prejudice, on an assumption as to the facts favorable to defendants' claim," it satisfies a defendant's right to an impartial jury under the Sixth Amendment. *Williams-Davis*, 90 F.3d at 499.

Like the D.C. Circuit, the First and Fifth Circuits vest trial courts with broad discretion to decide the procedures necessary to assure absence of prejudice where an allegation of external contacts with a jury is raised, but also do not invoke a presumption of prejudice. *See United States v. Boylan*, 898 F.2d 230, 258 (1st Cir. 1990) ("When a colorable claim of jury misconduct surfaces, the district court has broad discretion to determine the type of investigation which must be mounted." (citing *United States v. Hunnewell*, 891 F.2d 955, 961 (1st Cir. 1989))); *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) (recognizing "trial court's considerable discretion in investigating and resolving charges of jury tampering"). In the First Circuit, "[s]o long as the district judge erects, and employs, a suitable framework for investigating the allegation and gauging its effects, and thereafter spells out his findings with adequate specificity to permit informed appellate review . . . his 'determination that the jury has not been soured deserves great respect [and] . . . should not be disturbed in the absence of a patent abuse of discretion.'" *Boylan*, 898 F.2d, at 258 (quoting *Hunnewell*, 891 F.2d at 961). And in the Fifth Circuit, where a district court "examine[s] the content of the [extraneous] material, the way in which

it was brought to the jury's attention, and the weight of the evidence against the defendant," the court of appeals also reviews for abuse of discretion. *United States v. Davis*, 393 F.3d 540, 549 (5th Cir. 2004) (citing *United States v. Ruggiero*, 56 F.3d 647, 652 (5th Cir. 1995)).

Petitioner's case demonstrates why this Court should reject the approaches adopted by the D.C., First, and Fifth Circuits that allow a court broad discretion to decide the parameters for investigating external influence on a jury, do not invoke *Remmer's* presumption of prejudice, and then review for abuse of discretion. In petitioner's case, the district court did not presume prejudice in the face of serious allegations of an external influence on the jury. Instead, it exercised its discretion to decline petitioner's request to question other witnesses with direct knowledge of the external contacts as well as the request to present additional evidence – such as phone records – in support of the allegations. The district court thereafter made a credibility finding to altogether discredit the witness who provided sworn testimony about the improper external contacts. The court of appeals affirmed this approach by finding that the district court had not abused its discretion in the methods it chose for investigating the allegations of improper contacts and concluded that the district court's factual findings were "entitled to great weight" and "ought not to be disturbed unless manifestly unreasonable," *Bostick*, 791 F.3d at 153 (citing *United States v. White*, 116 F.3d 903, 928 (D.C. Cir. 1997)). This combination of conclusions was at odds with the court's own requirement that the district court evaluate the allegations "on an assumption as to the facts favorable to defendants' claim," *Williams-Davis*, 90

F.3d, at 499. But more importantly, these conclusions short-circuited the question of whether jury impartiality had been compromised.

By allowing a district court to decide the validity of the allegations of external jury contacts based on the credibility of a witness, rather than presuming prejudice and then requiring proof of the absence of prejudice, a court collapses the prejudice inquiry into a credibility determination and thereby obviates consideration of the Sixth Amendment violation at issue. This Court should reject such an outcome-determinative approach and affirm that the presumption of prejudice articulated in *Remmer* applies where a court has cut off inquiry into an allegation that extrinsic evidence has reached a jury.

At a minimum, the Court should resolve the conflicts between the D.C., First, and Fifth Circuits and other circuits that require an evaluation of the potential prejudicial effect that a specific allegation of unauthorized contact *could* have on a jury, and thereby invoke a presumption of prejudice without first deciding whether the allegations are conclusively proved. In the Fourth Circuit, which "continu[es] to apply the *Remmer* presumption of prejudice," *United States v. Lawson,* 677 F.3d 629, 643 (4th Cir. 2012), the defendant has a "minimal" burden to establish that the extrajudicial communications were "more than innocuous interventions," *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996). The government then bears the "heavy burden" of proving harmlessness of the external contacts, which the Fourth Circuit has held requires elimination of any "reasonable possibility that the jury's verdict was influenced by an improper communication." *Haley v. Blue Ridge Transfer*

Co., 802 F.2d 1532, 1537 (4th Cir. 1986); *see also Remmer*, 347 U.S. at 229; *United States v. Barnes*, 747 F.2d 246 (4th Cir. 1984)).

In the Second and Eighth Circuits, a defendant must allege only that "the extrinsic contact relates to 'factual evidence not developed at trial'" in order to trigger a presumption of prejudice that the government must then overcome. *See United States v. Hall,* 85 F.3d 367, 371 (8th Cir. 1996) (quoting *United States v. Cheyenne,* 855 F.2d 566, 568 (8th Cir. 1988) (holding that allegations of juror contact trigger presumption of prejudice that shifts burden to government to establish absence of prejudice beyond a reasonable doubt)); *see also United States v. Greer,* 285 F.3d 158, 173 (2d Cir. 2000) (holding that once a defendant alleges that a juror becomes aware of "extra-record information," a presumption of prejudice applies). Once the presumption applies, the Second Circuit applies an objective test to determine "the *probable* effect on the hypothetical average juror." *Greer*, 285 F.3d at 173 (internal quotations and citation omitted) (emphasis added). The Eighth Circuit also instructs district courts to apply an objective test considering: "(1) whether the extrinsic evidence was received by the jury and the manner in which it was received; (2) whether it was available to the jury for a lengthy period of time; (3) whether it was discussed and considered extensively by the jury; (4) whether it was introduced before a verdict was reached and, if so, at what point during the deliberations was it introduced; and (5) whether it was reasonably likely to affect the verdict, considering the strength of the government's case and whether it outweighed any possible prejudice caused by the extrinsic evidence." *United States v. Blumeyer*, 62 F.3d 1013,

1016 (8th Cir. 1995). The Eighth Circuit reviews whether a trial court failed to accord a factor proper weight or failed to consider a factor altogether under a clear error standard of review. *Id.* 1018.

While the Ninth, Seventh, Tenth, and Eleventh Circuits all recognize that a presumption of prejudice need not be automatically applied, allegations of an extraneous juror contact generally trigger the presumption and require a full investigation unless the alleged contact is plainly innocuous or de minimis, indicating its harmlessness. *See Tarango v. McDaniel*, 837 F.3d 936, 945 (9th Cir. 2016) (citing *Caliendo v. Warden of Cal. Men's Colony,* 365 F.3d 691, 696 (9th Cir. 2004)); *United States v. Martin,* 692 F.3d 760, 765 (7th Cir. 2012); *United States v. Scull,* 321 F.3d 1270, 1280 (10th Cir. 2003); *United States v. Ronda,* 455 F.3d 1273, 1299 (11th Cir. 2006). In fact, in the Ninth Circuit, once an allegation of external contacts is made, a court is *required* to examine "(1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict." *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986).

The Seventh Circuit instructs that "[i]n determining whether there was a reasonable possibility of prejudice, the judge may look at an array of factors, including

the [1]nature and extent of the evidence against the defendants, [2]admonitions and instructions given to the jury, and [3]the mixed nature of the verdicts." *United States v. Smith*, 26 F.3d 739, 760 (7th Cir. 1994) (citing *United States v. Sanders*, 962 F.2d 660, 673-74 (7th Cir.1992)).

Although the Tenth Circuit likewise recognizes the applicability of a presumption of prejudice, *United States v. Scull*, 321 F.3d 1270, 1280 (10th Cir. 2003), it holds that a hearing may be unnecessary if the defendant can only speculate that improper contact occurred; if the communication was not about the matter before the jury; or if the alleged statement is "both ambiguous and innocuous" or there is no evidence a juror actually heard it. *Stouffer v. Trammell*, 738 F.3d 1205, 1214-15 (10th Cir. 2013) (*Brown v. Finnan*, 598 F.3d 416, 420-23 (7th Cir. 2010)).

The Eleventh Circuit holds that a defendant has the initial burden to show that the jury was exposed to extrinsic evidence or contacts that "posed a reasonable possibility of prejudice." *United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006) (citing *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984)). Upon such a showing, the burden shifts to the government to show that the exposure was harmless. *Id.* (citing *Remmer*, 347 U.S. at 229).

Even in the Third Circuit, which has rejected a presumption of prejudice, "[i]f there is reason to believe that jurors have been exposed to prejudicial information, the trial judge is obliged to investigate the effect of that exposure on the outcome of the trial." *United States v. Console,* 13 F.3d 641, 669 (3d Cir. 1993). In examining for prejudice, the court is required to conduct an objective inquiry into the "probable

effect" of the external contact "on a hypothetical average juror." *United States v. Urban*, 404 F.3d 754, 777 (3d Cir. 2005) (citing *United States v. Lloyd,* 269 F.3d 228 (3d Cir. 2001)).

Finally, the Sixth Circuit rests at the other end of the spectrum closer to the D.C., First, and Fifth Circuits, as it reads this Court's decision in *Smith v. Phillips,* 455 U.S. 209 (1982), to place the burden on the defendant to establish "actual prejudice" before granting relief based on an allegation of external contacts with a jury. *See United States v. Corrado*, 304 F.3d 593, 603 (6th Cir. 2002) (citing *United States v. Pennell,* 737 F.2d 521, 532 (6th Cir. 1984)). But the Sixth Circuit's standard, like the D.C. Circuit's, demonstrates the wide variance in approaches for investigating external influences on juries and differing views on application of a presumption of prejudice once an external influence is alleged. These variances emphasize the need for this Court to clarify a minimum standard to assure that the Sixth Amendment's guarantee of an impartial jury is not violated. Thus, this Court should affirm that *Remmer*'s presumption of prejudice applies whenever extrinsic evidence is alleged to have reached a jury and cannot be sidestepped through a truncated investigation into the truth of the allegations. In doing so, this Court can resolve the confusion amongst the circuits concerning the proper standard for investigating and deciding when a defendant's Sixth Amendment right to an impartial jury has been violated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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