No. 14-534

In the Supreme Court of the United States

RAJAT K. GUPTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by refusing to instruct the jury that evidence of petitioner's good character, standing alone, was enough to create a reasonable doubt about his guilt.

2. Whether the district court abused its discretion in limiting, under Rule 403 of the Federal Rules of Evidence, the scope of a defense witness's testimony that the trial court found to be cumulative and prejudicial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 747 F.3d 111.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2014. A petition for rehearing was denied on July 14, 2014 (Pet. App. 85a). On September 4, 2014, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 11, 2014, and the petition was filed on November 10, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and three counts of securities fraud, in violation of 15 U.S.C. 78j(b), 78ff; 18 U.S.C. 2; and 17 C.F.R. 240.10b-5. Pet. App. 55a-56a. He was sentenced to concurrent terms of 24 months of imprisonment on each count, to be followed by one year of supervised release. He was also ordered to pay a $5 million fine.[1] The court of appeals affirmed. Pet. App. 1a-54a.

1. Petitioner, while serving as a member of the board of directors of The Goldman Sachs Group, Inc. (Goldman Sachs or Goldman), illegally disclosed material non-public information about Goldman Sachs to his close friend and business partner Raj Rajaratnam—the head of a multi-billion dollar hedge fund known as The Galleon Group (Galleon). Rajaratnam and other co-conspirators at Galleon then traded on the information, reaping millions of dollars in profits and avoiding millions of dollars in losses. Pet. App. 2a-3a; Gov't C.A. Br. 2-4.

a. On September 23, 2008, in the midst of a deep national crisis in the financial markets, Goldman Sachs arranged for a $5 billion investment by famed investor Warren Buffett. The investment was "highly confidential, as it was likely to have 'a meaningful impact' on Goldman's stock price." Pet. App. 4a (citation omitted). Petitioner, a former managing director of the consulting firm McKinsey & Company, partici-

[1] In an amended judgment subject to a separate appeal, the district court also ordered petitioner to pay $6.2 million in restitution. Pet. App. 2a.

pated by telephone from a conference room at McKinsey's New York office in a special Goldman board of directors meeting convened to approve the deal. He was on the call from 3:13 p.m. to 3:53 p.m. The deal "was to be announced to the public after the 4 p.m. close of trading on the New York Stock Exchange." *Ibid.*

Immediately after the call ended, petitioner tipped Rajaratnam about the Buffett transaction. At 3:54 p.m., petitioner's assistant called Rajaratnam's direct line; the McKinsey conference room telephone from which petitioner had participated in the Goldman Sachs board meeting was then connected to the call to Rajaratnam's line for about 30 seconds. This call was the only call to Rajaratnam's direct line in the entire hour before the market closed. According to Rajaratnam's secretary, the caller said it was urgent that he speak to Rajaratnam, and she put him through because he was on a short list of "important people" whose calls Rajaratnam would take during the last 30 minutes of the trading day. Pet. App. 4a-5a; Gov't C.A. Br. 8-9. Petitioner was one of the no-more-than ten people on that list in 2008. Pet. App. 13a. Immediately after getting off the call with petitioner, Rajaratnam instructed Galleon co-founder Gary Rosenbach and Galleon trader Ananth Muniyappa to quickly buy Goldman stock before the market closed for the day. *Id.* at 5a.

Rosenbach bought 200,000 shares of Goldman stock, and he also purchased 1.5 million shares of a financial sector index fund that included Goldman stock among its holdings. Muniyappa managed to secure 67,200 shares of Goldman stock. Pet. App. 5a. "In all, the Goldman Sachs stock purchased by Muni-

yappa and Rosenbach at the behest of Rajaratnam in the final minutes of the trading day on September 23—excluding the shares of the index fund—cost more than $33 million." *Id.* at 6a.

The $5 billion Warren Buffett investment in Goldman Sachs was announced to the public around 6 p.m. on September 23. When the market opened for trading the next day, Goldman's stock price surged to a high nearly seven percent above its September 23 closing price, and Rajaratnam sold all of the Goldman shares he had purchased the previous afternoon for a profit exceeding $1 million. Pet. App. 6a; Gov't C.A. Br. 11.

On the same morning that he raked in his overnight profit of more than $1 million, Rajaratnam admitted his insider trading in two recorded calls with Ian Horowitz—Galleon's head trader. During the first call with Horowitz, Rajaratnam referenced the "big drama" of the prior afternoon and related that he had received a call "at 3:58" "[s]aying something good might happen to Goldman" (C.A. App. 1142-1143). Pet. App. 6a-7a. During the second call, Rajaratnam again told Horowitz that he "got a call, right, saying something good's gonna happen" (C.A. App. 1148). Pet. App. 7a-8a.

b. Petitioner gave Rajaratnam another tip about Goldman just a month later. On October 23, 2008, approximately eight weeks into the fourth quarter of Goldman Sach's fiscal year, Goldman's chairman convened a call to alert the board that Goldman was losing money for the quarter. "At that time, Wall Street analysts were projecting that Goldman—which, since becoming a public company, had never reported a quarterly loss—would continue to report profits."

Pet. App. 9a. From a telephone in his home office, petitioner participated in the conference call, which began shortly after the stock market closed and ended at 4:49 p.m. Immediately after the call ended, petitioner tipped Rajaratnam about Goldman's then-undisclosed losses. At approximately 4:50 p.m., "[petitioner's] home office telephone was connected to Rajaratnam's direct line for some 12 1/2 minutes, until 5:03 p.m." *Id.* at 10a. The next morning, just one minute after the market opened for trading, Rajaratnam began dumping all of his Goldman stock, thereby avoiding losses of approximately $3.8 million. *Ibid.*; Gov't C.A. Br. 13.

That afternoon, in a wiretapped call between Rajaratnam and Galleon portfolio manager David Lau, Rajaratnam admitted to obtaining inside information from a Goldman Sachs board member. Pet. App. 10a; Gov't C.A. Br. 13. Rajaratnam told Lau: "I heard yesterday from somebody who's on the Board of Goldman Sachs, that they are gonna lose $2 per share. The Street has them making $2.50." Pet. App. 12a. Rajaratnam went on to describe, accurately, additional confidential and non-public details about Goldman's intra-quarter performance relayed by his contact on the Goldman Sachs board. *Id.* at 12a-13a.

c. Petitioner and Rajaratnam had a close relationship. Petitioner described Rajaratnam as "a very close friend." Pet. App. 13a. Rajaratnam, in turn, listed petitioner as a "good friend" in his address book. *Ibid.*

Petitioner and Rajaratnam "were also involved in several business ventures together." Pet. App. 13a. In 2005, they launched a leveraged investment fund, Voyager Capital Partners (Voyager). By 2007, peti-

tioner had invested $10 million in Voyager and held a 20% equity interest in the fund. Rajaratnam had an 80% stake and made the investment decisions for Voyager, which included investing Voyager assets in Galleon funds. *Id.* at 13a-14a; Gov't C.A. Br. 3-4. In 2007, petitioner, Rajaratnam, and two others formed a private equity fund, New Silk Route, in which Rajaratnam invested $50 million; petitioner served as the chairman. Pet. App. 13a-14a.

Petitioner "was also heavily involved in Galleon itself." Pet. App. 14a. "He had invested several million dollars in Galleon funds; he was involved in the planning of a new Galleon fund called Galleon Global (which ultimately was not created); he had a keycard allowing him access to Galleon's New York offices; and he regularly worked on Galleon's behalf in seeking potential investors." *Ibid.* In early 2008, Rajaratnam made petitioner the chairman of Galleon International—a fund that managed more than $1 billion in assets—and gave him a 15% ownership stake in the fund. *Ibid.*

In a July 29, 2008, call from petitioner to Rajaratnam, which was captured in a wiretap, the two men discussed a wide variety of personal and professional topics that demonstrated the breadth and closeness of their relationship as well as petitioner's willingness to place that relationship above his corporate duties of confidentiality. Gov't C.A. Br. 5-6; see Pet. App. 14a. During the call, Rajaratnam questioned petitioner about a rumor he had heard that Goldman was seeking to buy a commercial bank. Petitioner informed Rajaratnam that the bank investment had been "a big discussion at the board meeting." Pet. App. 14a. Petitioner then disclosed more non-public details of

the board's deliberations, including that it was a "divided discussion" and that the insurance company AIG was "definitely" in the "mix." C.A. App. 1116-1117; see Pet. App. 14a-15a; Gov't C.A. Br. 5-6. Petitioner made these disclosures even though "[t]he board's discussions were confidential." Pet. App. 15a. "Even the matter of whether or not a subject had been discussed at a Goldman board meeting was confidential." *Ibid.*[2]

2. A grand jury in the Southern District of New York indicted petitioner on one count of conspiring to commit securities fraud, in violation of 18 U.S.C. 371, and five counts of securities fraud, in violation of 15 U.S.C. 78j(b), 78ff; 18 U.S.C. 2; and 17 C.F.R. 240.10b-5. Gov't C.A. Br. 1-2. Count 1 alleged that petitioner, as a member of the boards of directors of both Goldman Sachs and Procter & Gamble, conspired to illegally disclose material non-public information about those companies to Rajaratnam. 11-CR-907 Docket entry No. (Dkt. No.) 1 (S.D.N.Y. Oct. 25, 2011). Count 2 alleged that petitioner committed securities fraud based on his disclosure of inside information to Rajaratnam about Goldman Sachs's earnings in March 2007. Gov't. C.A. Br. 14-15. Counts 3 and 4 charged

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[2] A number of other tips petitioner gave to Rajaratnam about either Goldman Sachs or Procter & Gamble were charged as overt acts of the Count 1 conspiracy on which he was convicted. See Gov't C.A. Br. 14-17 (detailing, *inter alia*, a September 2007 tip and a June 2008 tip related to Goldman). Petitioner was acquitted on substantive securities fraud counts related to two of those tips: a March 2007 tip about Goldman Sachs and a January 2009 tip about Procter & Gamble. The substantive counts on which he was acquitted were not supported by wiretap evidence or by the type of phone records that supported his substantive counts of conviction. See *id.* at 14-18.

petitioner with securities fraud based on the September 23, 2008, Goldman trades executed on behalf of Rajaratnam by Muniyappa and Rosenbach. *Id.* at 12. Count 5 charged petitioner with securities fraud based on the October 24, 2008, sale of Goldman stock. *Id.* at 12-14. Count 6 alleged that petitioner committed securities fraud based on a tip he conveyed to Rajaratnam related to a drop in sales by Procter & Gamble. *Id.* at 18.

a. At trial, petitioner called six character witnesses, who "testified that they believed [petitioner] to be an honest person." Pet. App. 15a. The district court denied petitioner's request that the jury be instructed that "character testimony may in and of itself raise a reasonable doubt" as to a defendant's guilt of the charges against him. *Id.* at 67a-68a. The court criticized such an instruction as "very unbalanced" because it "artificially singles out one aspect of the proof and gives it sort of prominence above all others by implication." *Ibid.* The district court instructed the jury that it could consider the "character evidence, together with all the other facts and all the other evidence in the case, and give it such weight as you deem appropriate." *Id.* at 70a.

b. Petitioner also called his daughter, Geetanjali Gupta (Geetanjali), in support of his defense "that in mid-September 2008, [petitioner] was angry with Rajaratnam for having withdrawn $25 million from the Voyager fund (in which [petitioner] had invested $10 million and Rajaratnam had invested $40 million) without informing [petitioner] of the withdrawal and without alerting [petitioner] to withdraw some of his own capital—so angry that [petitioner] would not have

shared inside information about Goldman Sachs with Rajaratnam." Pet. App. 31a.

Petitioner proffered that Geetanjali would testify that before the September and October 2008 tips, her father stated the following:

> He told me that he was upset about Voyager. He told me that he was worried about the performance of the fund and that he was frustrated that he couldn't get information from Raj about it.
>
> He also told me he was angry that Raj had taken money out of the fund without telling him and that he thought that that—he didn't understand why he had taken the money out of the fund, and why if he had taken money out of the fund, he had not gotten any of it.

Pet. App. 74a (emphasis omitted) (Geetanjali's statement in response to questioning by the court outside the presence of the jury). In response to the government's hearsay objection to the proposed testimony, petitioner argued that it was not being offered to establish the truth about Rajaratnam's conduct and was admissible under Federal Rule of Evidence 803(3)'s "state of mind" exception to the hearsay rule. Pet. App. 32a.

Citing Rule 403 of the Federal Rules of Evidence, the district court ruled "that Geetanjali could testify to [petitioner's] 'attitude towards Rajaratnam' with respect to Voyager, 'at a given point or maybe two or three points' in time, but that Geetanjali could not testify to the 'substantive' details of what [petitioner] said, *i.e.*, that [petitioner] stated that he believed Rajaratnam had cheated him." Pet. App. 32a, 72a (internal citation omitted). In so limiting Geetanjali's

testimony, the court determined that the admission of "cumulative" testimony that petitioner believed Rajaratnam had cheated him would be "unduly prejudicial" under Rule 403. *Id.* at 36a-37a. The court "limited Geetanjali's testimony not on the ground that it was offered to prove that Rajaratnam had in fact cheated [petitioner] but rather because the court's view was that, if admitted, the jury would likely be unable to comprehend that it was not admitted for that purpose." *Id.* at 37a-38a.

Geetanjali then testified that, on September 20, 2008, petitioner had expressed "significant concern" about his investment in Voyager; that when making these statements petitioner was "stressed" and "quite upset"; and that petitioner was upset "more because of how Mr. Rajaratnam was treating the investment" than because of how the investment was performing. Pet. App. 83a. Geetanjali also testified that on October 10, 2008, petitioner had told her that "he was still having difficulty getting information from Mr. Rajaratnam. He was very frustrated about it. * * * And he was still very upset about the money." *Id.* at 83a-84a; see C.A. App. 987-988 (later conversations regarding petitioner's frustrations with Rajaratnam about Voyager).

c. The jury convicted petitioner on the Count 1 conspiracy charge as well as the three substantive securities fraud charges in Counts 3, 4, and 5. It acquitted him on two substantive securities fraud charges, Counts 2 and 6. Gov't C.A. Br. 2.

In sentencing petitioner, the district court stated that the government had proved petitioner's guilt to a "virtual certainty." C.A. App. 1635. The court imposed concurrent terms of 24 months of imprisonment

on each count, to be followed by one year of supervised release, and it ordered petitioner to pay a $5 million fine. Pet. App. 1a-2a.

3. The court of appeals affirmed. Pet. 1a-54a. The court rejected petitioner's argument that the district court erred in declining to give his requested jury instruction on character evidence. The court held, consistent with its prior decision in *United States* v. *Pujana-Mena*, 949 F.2d 24, 27-28 (2d Cir. 1991), "that an instruction that character testimony may by itself raise a reasonable doubt is not required." Pet. App. 53a.

The court of appeals also rejected petitioner's argument that the district court abused its discretion under Rule 403 in limiting Geetanjali's testimony. The court recounted the district court's reasoning that "the jury would have undue difficulty in distinguishing between the aspect of Geetanjali's testimony that could be considered for its truth as to [petitioner's] state of mind and that aspect [of the testimony] that indicated that [petitioner] had been cheated." Pet. App. 37a. The court then found "no basis for second-guessing the district court's view as to the likely effect on the jury." *Id.* at 38a.

The court of appeals further ruled that, even "if the limitation on Geetanjali's testimony was error, the error was harmless" in light of the factors outlined in *United States* v. *Oluwanisola*, 605 F.3d 124, 133 (2d Cir. 2010), for assessing whether a defendant has been prejudiced from the exclusion of evidence. Pet. App. 39a-40a. The court detailed the other evidence the district court had admitted at trial, encompassing both Geetanjali's testimony as well as additional documentary and testimonial evidence establishing that peti-

tioner learned that Rajaratnam had withdrawn money from Voyager and that petitioner believed he had been swindled. See *id.* at 41a-46a. The court concluded that the evidence admitted at trial "was clearly sufficient to enable [petitioner] to present his main defense" that petitioner was "so angry" with Rajaratnam by the fall of 2008 that petitioner "would not have shared inside information about Goldman Sachs" with him. *Id.* at 31a, 45a. The court further noted that the government had presented "powerful" evidence that petitioner had passed confidential information to Rajaratnam about Goldman Sachs on September 23 and October 23, 2008. *Id.* at 46a.

Having reviewed the entire record, the court of appeals found "no basis for a conclusion that, if Geetanjali had been allowed to testify that [petitioner] believed Rajaratnam's actions with respect to Voyager had cheated him—rather than to testify (as she was allowed to) that [petitioner] was quite upset over Rajaratnam's treatment of the Voyager investment—that testimony would have had any substantial influence on the jury." Pet. App. 46a.[3]

ARGUMENT

Petitioner asks (Pet. i) this Court to grant review to consider whether the court of appeals erred by holding that the district court did not abuse its discretion in (1) refusing to instruct the jury that "character evidence alone may create a reasonable doubt," and (2) circumscribing Geetanjali's testimony in order to avoid prejudice and confusion under Federal Rule of

[3] The court of appeals rejected all of petitioner's additional challenges, Pet. App. 16a-30a, 46a-52a, which petitioner does not renew in this Court.

Evidence 403. The court of appeals' holdings on both points were correct and do not otherwise warrant further review.

1. Petitioner contends (Pet. 14-23) that this Court's intervention is needed to resolve a conflict among the circuits about whether a defendant is entitled to a jury instruction stating that evidence of good character is, standing alone, enough to create a reasonable doubt precluding conviction. Although some disagreement exists among the circuits over whether such a "standing alone" instruction is ever required, the decision below is correct and this Court's review is not warranted.[4]

a. This Court has recognized that "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). Nonetheless, a district court retains discretion about the precise wording to use when formulating the instructions. See *United States* v. *Park*, 421 U.S. 658, 675 (1975) (reviewing a jury instruction formulation for abuse of discretion). A court may reject a proffered instruction as long as the essential points of the applicable law are covered in the instructions the court does give. See, *e.g.*, *United States* v. *Cunningham*, 54 F.3d 295, 301-302 (7th Cir.), cert. denied, 516 U.S. 883 (1995).

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[4] The Court has repeatedly and recently declined further review of this issue. See, *e.g.*, *Morrow* v. *United States*, 562 U.S. 842 (2010) (No. 09-9539); *Burke* v. *United States*, 513 U.S. 1110 (1995) (No. 94-694); *United States* v. *Daily*, 502 U.S. 952 (1991) (No. 90-1828); *Spangler* v. *United States*, 487 U.S. 1224 (1988) (No. 87-1643).

Here, petitioner presented character evidence in support of his theory that he did not commit the offenses for which he was charged. The district court properly instructed the jury that it could consider the "character evidence, together with all the other facts and all the other evidence in the case, and give it such weight as you deem appropriate." Pet. App. 70a. In doing so, the court satisfied its obligation to provide the jury with a correct statement of the law and to make clear that the jury should consider the character evidence when determining whether the prosecution had met its burden of proof.[5]

b. Petitioner argues (20-22) that the district court erred by refusing his request to instruct the jury that the character evidence may be "in and of itself sufficient to raise a reasonable doubt," Pet. App. 68a. But nothing in the Constitution or in any statute or rule requires any such special instruction on character evidence. Nor is there anything in the rationale underlying the admissibility of character evidence to justify a "standing alone" instruction.

In fact, an instruction that singles out character evidence for special treatment is confusing and potentially misleading. As Judge Learned Hand stated in *Nash* v. *United States*, 54 F.2d 1006, 1007 (2d Cir.), cert. denied, 285 U.S. 556 (1932), "evidence of good character is to be used like any other, once it gets before the jury, and the less they are told about the

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[5] Petitioner asserts (Pet. 21) that the jury may have interpreted that language to "mistakenly think that the defendant's evidence of good character is offered to excuse the alleged conduct, rather than to prove that it did not occur." But nothing in the plain wording of the court's instruction could have led the jury to disregard or undervalue the evidence of his good character.

grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly." To give a special instruction on character evidence creates a risk that the jurors may believe that even though they find the defendant guilty beyond a reasonable doubt, the apparent inconsistency between the criminal act and the defendant's reputation or character requires or justifies a verdict of acquittal, which would be contrary to the law.[6] In light of the potential confusion that a "standing alone" instruction can create, a district court does not abuse its discretion when it declines to give such an instruction.[7]

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[6] See generally *United States* v. *Pujana-Mena*, 949 F.2d 24, 31 (2d Cir. 1991) ("One of the primary problems with the 'standing alone' charge is that it risks having the jury disregard *all* the other evidence in the case."); *United States* v. *Burke*, 781 F.2d 1234, 1239 (7th Cir. 1985) ("People of impeccable reputation may commit crimes, and when they are charged with crime the question is whether they did it, not whether they enjoy a high social standing."); *United States* v. *Winter*, 663 F.2d 1120, 1148 (1st Cir. 1981) ("We do not think it the proper function of the trial judge to instruct the jury as to the weight it can or may give to any particular evidence that it believes. Rather, it appears to us to be a usurpation of the jury's special function."), cert. denied, 460 U.S. 1011 (1983).

[7] Although petitioner correctly points out (Pet. 22) that instructions about accomplice witness testimony may include language directing that such testimony "may be sufficient in itself to warrant conviction," that does not detract from the concerns over giving a "standing alone" instruction on character evidence. For accomplice testimony, such instructions are often appropriate to balance the remainder of the charge, which generally also includes a warning that "[t]he law requires * * * that the testimony and motives of a cooperating witness be scrutinized with particular care and caution." Pet. App. 70a; see, *e.g.*, 5th Cir. Pattern Jury Instructions (Crim. Cases) Instruction No. 1.15 (2012) (containing similar caution). In this case, the jury was not cautioned against

c. Petitioner contends (Pet. 16) that a "standing alone" instruction is required by this Court's decisions in *Edgington* v. *United States*, 164 U.S. 361 (1896), and *Michelson* v. *United States*, 335 U.S. 469 (1948). That assertion is incorrect.

In *Edgington*, the Court held that the trial court erred in charging the jury that evidence of good character is not a defense unless there was otherwise doubt of the defendant's guilt. Although the Court recognized that evidence of good character may, alone, give rise to a reasonable doubt, the Court did not suggest that the Constitution requires a specific jury instruction to that effect. 164 U.S. at 365-366. See *United States* v. *Pujana-Mena*, 949 F.2d 24, 28 (2d Cir. 1991) ("*Edgington* was thus 'striking down a limitation on the use of character evidence, not requiring "that the lack of limitation must be expressly pointed out to the jury."'") (citations omitted).

In *Michelson*, the defendant presented evidence of his good character through the testimony of several witnesses who were familiar with his reputation as a law-abiding citizen. 335 U.S. at 471-472. The government cross-examined those witnesses by asking if they had heard that the defendant had been arrested for receiving stolen goods. *Id.* at 472. After concluding that this type of cross-examination was proper, the Court noted that character evidence "is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so

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relying on the character evidence, and therefore a "standing alone" instruction was not needed to ensure the jury's proper consideration of the character evidence.

instructed." *Id.* at 476 (citing *Edgington*, 164 U.S. 361).

The *Michelson* Court's passing statement that it had previously "held" in *Edgington* that a court must sometimes instruct the jury about the significance of character evidence was factually incorrect. Nothing in the *Edgington* decision indicated that a "standing alone" instruction is ever required. In any event, the Court's statement in *Michelson* was not essential to the Court's judgment or even pertinent to the rationale of its decision. That dictum does not establish any rule of law that governs the issue in this case, as numerous courts of appeals have recognized. See *Pujana-Mena*, 949 F.2d at 29; *United States* v. *Burke*, 781 F.2d 1234, 1241 (7th Cir. 1985); *United States* v. *Winter*, 663 F.2d 1120, 1147-1148 & n.46 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), abrogated on other grounds by *Salinas* v. *United States*, 522 U.S. 52 (1997).

d. Petitioner incorrectly states (Pet. 14) that the decisions of three other circuits conflict with the court of appeals' ruling here. In fact, only the D.C. Circuit has interpreted *Edgington* and *Michelson* as requiring a "standing alone" instruction in all cases in which the defendant offers character evidence. See *United States* v. *Lewis*, 482 F.2d 632, 637 (1973).

Petitioner is wrong to assert (Pet. 14) that "he would have been entitled to the charge he requested" in the Fifth Circuit. Neither of the two cases he cites from that circuit supports that assertion. In *United States* v. *Hewitt*, 634 F.2d 277 (1981), the Fifth Circuit stated—in dicta—that "[i]n some circumstances, evidence of good character may of itself create a reasonable doubt as to guilt, and the jury must be appropri-

ately instructed." *Id.* at 278. Petitioner misreads (Pet. 17) this statement to require a "standing alone" instruction, when in fact all it requires is that the jury be "appropriately" instructed as to character evidence. *Hewitt*, 634 F.2d at 278. Nothing in *Hewitt* suggests that the instruction given in this case—in which the district court directed the jury to consider the "character evidence, together with all the other facts and all the other evidence in the case, and give it such weight as you deem appropriate" (Pet. App. 70a)—was improper or insufficient under that standard.

Petitioner's reliance on the Fifth Circuit's decision in *United States* v. *John*, 309 F.3d 298, 302-304 (2002), is equally misplaced. There, the court of appeals overturned a criminal conviction where the district court's instruction to the jury had failed to address character evidence at all. *Id.* at 304. The court of appeals held that the district court's "treatment of character as a non-issue was tantamount to impairing [the defendant's] ability to present his defense." *Id.* at 305. But the court did not state that a "standing alone" instruction is necessarily required in cases involving character evidence. Nor did it imply that the type of instruction provided in this case would have failed to pass muster.

Any doubt about the governing rule in the Fifth Circuit is resolved by *United States* v. *Ruppel*, 666 F.2d 261, 273-274 (5th Cir.), cert. denied, 458 U.S. 1107 (1982). There, the court of appeals expressly rejected the notion that, in cases involving character evidence, the jury must be instructed that such evidence "standing alone" is enough to create a reasonable doubt as to guilt. *Ibid.* (citing *United States* v. *Fon-*

tenot, 483 F.2d 315, 323 (5th Cir. 1973); see *ibid.* ("There is, of course, no ritualistic incantation or magic formula that the judge must recite in his charge on character evidence.").

Petitioner is also wrong to argue (Pet. 17) that the Eleventh Circuit embraced his position in *United States* v. *Thomas*, 676 F.2d 531 (1982). There, the court of appeals ruled that the defendant had not presented sufficient evidence to warrant an instruction on character evidence. *Id.* at 535-537. Accordingly, it had no occasion to consider whether a district court is required to give a "standing alone" character evidence instruction on request. Petitioner is wrong to describe (Pet. 17) *Thomas* as a case in which the court "approv[ed] [a] requested instruction that 'evidence of good character . . . may of itself give rise to a reasonable doubt.'" In any event, as petitioner acknowledges (*ibid.*), the Eleventh Circuit has subsequently ruled that a district court did not abuse its discretion in instructing a jury "that character * * * evidence should be considered along with all of the other evidence in the case"—just as the district court did here. *United States* v. *Borders*, 693 F.2d 1318, 1328-1330 (1982), cert. denied, 461 U.S. 905 (1983).[8]

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[8] Petitioner's reliance (Pet. 17 n.5) on pattern jury instructions is also unavailing. Pattern jury instructions are "suggestive rather than absolutely binding." *Burke*, 781 F.2d at 1239 n.2 (7th Cir. 1985); see, *e.g.*, 11th Cir. Pattern Jury Instructions (Crim. Cases) at p. iii (2010) ("adjudicative approval" of the pattern instructions "must await case by case review"). Moreover, neither of the pattern instructions petitioner cites directs a jury that character evidence may "alone" or "itself" create a reasonable doubt. See 5th Cir. Pattern Jury Instructions (Crim. Cases) Instruction No. 1.09 (2012); 11th Cir. Pattern Jury Instructions (Crim. Cases) Special Instruction No. 12 (2010).

In short, the D.C. Circuit is the only court of appeals to have held that a defendant is entitled to an instruction that character evidence, standing alone, may give rise to a reasonable doubt of guilt. See *Lewis*, 482 F.2d at 637. By contrast, the majority of the courts of appeals have concluded that a defendant who introduces character evidence is *not* entitled to such an instruction.[9] The D.C. Circuit has not reconsidered the issue in light of the overwhelming weight of authority from other circuits since *Lewis* was decided. Indeed, the D.C. Circuit does not appear to have cited the relevant holding from *Lewis* since that case was decided over 40 years ago, in 1973. Perhaps for this reason, this Court has repeatedly and recently declined further review of this issue. See note 4, *supra* (citing cases). There is no reason for a different result here.

e. This case would be a poor vehicle for considering whether the jury should be instructed that evidence of good character, standing alone, is enough to

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[9] See *Pujana-Mena*, 949 F.2d at 27-32; *United States* v. *Harrington*, 919 F.2d 449, 450 (7th Cir. 1990) (per curiam); *United States* v. *Spangler*, 838 F.2d 85, 87 (3d Cir.), cert. denied, 486 U.S. 1033 (1988); *Borders*, 693 F.2d at 1328-1330; *Ruppel*, 666 F.2d at 273-274; *Winter*, 663 F.2d at 1146-1148; *United States* v. *Foley*, 598 F.2d 1323, 1336-1337 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *Carbo* v. *United States*, 314 F.2d 718, 746-747 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964); *Black* v. *United States*, 309 F.2d 331, 343-344 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963); *Poliafico* v. *United States*, 237 F.2d 97, 114 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957). Cf. *Oertle* v. *United States*, 370 F.2d 719, 726-727 (10th Cir. 1966) (holding that although *Edgington* and *Michelson* do not compel a "standing alone" instruction, such instruction may be warranted when defendant relies solely on good character evidence as defense), cert. denied, 387 U.S. 943 (1967).

create reasonable doubt. Even if the district court erred by refusing to provide that instruction, any such error was harmless.

As the court of appeals concluded in response to petitioner's other claim of error, the government presented "strong" evidence that petitioner "in fact passed confidential information to Rajaratnam on September 23 and October 23." Pet. App. 45a-46a; see C.A. App. 1635 (noting that the government proved petitioner's guilt to a "virtual certainty"). Moreover, character evidence played only a minor role in petitioner's defense. During a defense summation that spans approximately 76 transcript pages, petitioner's counsel referred to the character evidence just once, in the context of arguing that petitioner lacked a motive to commit the crime. C.A. App. 1033. In these circumstances, no reason exists to believe that the minor variation between the jury instruction given by the district judge and the "standing alone" instruction requested by petitioner would have made any difference in the outcome of his trial.

2. Petitioner also contends (Pet. 23-34) that the court of appeals erred in affirming the district court's limitation of Geetanjali's testimony under Rule 403 of the Federal Rules of Evidence and, further, that the district court's ruling "imperil[ed] the defendant's right, guaranteed by the Sixth Amendment, to present a defense" (Pet. 23). The court of appeals' decision was correct, and its fact-bound ruling on this issue warrants no further review. In any event, petitioner's question presented (Pet. i) does not implicate the court's alternative holding that any Rule 403 error was harmless. That holding provides an independently sufficient basis for affirming the district court's

ruling and would obviate any need to consider the question that he does present.

a. The Sixth Amendment's Compulsory Process Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI. Together with the Due Process Clause, the Compulsory Process Clause "guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006) (citation and internal quotation marks omitted). Nonetheless, a "defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions" and "may thus 'bow to accommodate other legitimate interests in the criminal trial process.'" *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998) (one set of internal quotation marks omitted) (quoting *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987)). In particular, state or federal rules "excluding evidence from criminal trials * * * do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Ibid.* (quoting *Rock*, 483 U.S. at 56).

Under Rule 403, relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Citing Rule 403 as an example, this Court has recognized the constitutionality of such "well-established rules of evidence [that] permit trial judges to exclude evidence if its probative value is outweighed by certain other factors

such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes*, 547 U.S. at 326.

This Court has also explained that "courts of appeals [must] afford broad discretion to a district court's evidentiary rulings." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008). Such "deference" is appropriate because of the district court's "familiarity with the details of the case and its greater experience in evidentiary matters." *Ibid.* The Court has emphasized that the case for deference is "particularly true with respect to Rule 403 since it requires an 'on-the-spot balancing of probative value and prejudice, potentially to exclude as unduly prejudicial some evidence that has already been found to be factually relevant.'" *Ibid.* (quoting Stephen Alan Childress & Martha S. Davis, *Federal Standards of Review* § 4.02, at 4-16 (3d ed. 1999)).

b. The court of appeals correctly applied these settled principles when it held that the district court did not abuse its discretion when imposing narrow limitations on Geetanjali's testimony under Rule 403. Pet. App. 31a-39a.

Petitioner primarily sought to have Geetanjali testify that petitioner told her, before September 24, 2008 (the date of the earliest tip underlying his substantive securities fraud convictions), that he was angry with Rajaratnam because Rajaratnam had cheated him by taking money out of the Voyager fund. See Pet. 7. Petitioner argued that the testimony was admissible under the state-of-mind exception to the hearsay rule, Fed. R. Evid. 803(3), because it was being offered to establish that petitioner was hostile to Rajaratnam, and not to prove that Rajaratnam had

in fact cheated petitioner. Pet. App. 72a-73a; see, *e.g.*, Dkt. No. 91 at 1, 4 (June 12, 2012).

The district court allowed Geetanjali to testify about her father's hostile attitude to Rajaratnam, at the relevant time, due to Rajaratnam's treatment of the Voyager investment. But the court also ruled that she could not testify to petitioner's specific belief that Rajaratnam had cheated him by taking money out of the Voyager fund without telling him. Pet. App. 31a-33a. The court limited her testimony in this fashion based on its view that, under Rule 403, "the jury would likely be unable to comprehend that the statement could be considered only to show [petitioner's] belief [about what Rajaratnam had done] and not to show the truth of what he believed [*i.e.*, that Rajaratnam had in fact cheated petitioner]." *Id.* at 34a.

That ruling was within the district court's discretion. As the court of appeals explained, the district court recognized that because Geetanjali had no personal knowledge about the Voyager fund or Rajaratnam's withdrawal of funds, she could not be cross-examined by the government about those underlying facts "in any meaningful way." Pet. App. 37a. The district court also feared that the jury would believe that petitioner would not lie to his daughter, and thus would be likely to conclude from her testimony that Rajaratnam had actually cheated him. *Id.* at 37a-38a.

In those circumstances, the district court permissibly concluded that "the jury would have undue difficulty in distinguishing between the aspect of Geetanjali's testimony that could be considered for its truth as to [petitioner's] state of mind and the aspect that indicated that [petitioner] had been cheated." Pet. App. 37a. The court addressed this concern by allow-

ing Geetanjali to testify that petitioner was "angry," "quite upset," and "frustrated" with Rajaratnam due to the way he was "treating the [Voyager] investment," while preventing her from asserting a more specific factual basis for petitioner's anger. *Id.* at 38a-39a. That approach avoided confusing the jury while allowing petitioner to advance his theory that he would not have provided Rajaratnam with inside information because he was angry with Rajaratnam's treatment of the Voyager fund.[10]

Two other considerations reinforce the conclusion that the district court's evidentiary ruling was not an abuse of discretion. First, as the court of appeals also noted, the district court reasonably determined that testimony from Geetanjali that petitioner believed Rajaratnam had cheated him would have been "cumulative." Pet. App. 36a-37a, 39a. The district court permitted the jury to hear a great deal of other evidence establishing that Rajaratnam had, in fact, taken money out of the Voyager fund without petitioner's knowledge.[11] Second, the court granted petitioner

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[10] Petitioner is wrong to suggest that "Geetanjali's testimony established only that [petitioner] was upset in September 2008 about the *performance* of the Voyager investment." Pet. 10 (emphasis added). As the court of appeals noted, that characterization "is belied by the testimony itself." Pet. App. 38a. When Geetanjali was "asked whether [petitioner] was upset 'because of how the investment was doing or because of how Mr. Rajaratnam was treating the investment,'" she responded that the problem was "more because of how Mr. Rajaratnam was *treating* the investment." *Id.* at 38a-39a. (emphasis added) (quoting Tr. 3094).

[11] For example, Government witness Anil Kumar testified that petitioner told him in mid-to-late October 2008 that Rajaratnam had mismanaged the Voyager fund, C.A. App. 675, and further, that between late February and April 2009, petitioner told him

wide latitude in introducing Geetanjali's testimony about petitioner's hostile attitude towards Rajaratnam in the relevant time period. Pet. App. 38a (noting that court placed no "restriction on the words she could use to describe his attitude"). Those considerations confirm that the court's evidentiary ruling reasonably balanced petitioner's presentation of his defense to the jury and the need to avoid undue risk of prejudice under Rule 403.

c. Petitioner argues that the district court should have weighed the potential for prejudice differently in light of the particular facts of this case and that the court of appeals should have ruled that the district court abused its discretion. But this Court does not typically grant certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. No reason exists to depart from that standard practice here.

In any event, petitioner's fact-bound criticism of the lower courts' analyses misses the mark. First, petitioner argues (Pet. 26) that the district court's evidentiary ruling precluded him from arguing that

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that Rajaratnam had cheated him by withdrawing money from the Voyager fund, *id.* at 676. The district court also admitted (over the government's objection) an October 2, 2008, wiretapped conversation between Rajaratnam and a Galleon colleague in which Rajaratnam stated, in apparent reference to petitioner and Voyager, "I didn't tell him that I took that equity out." *Id.* at 1603; see also *id.* at 979-980. Defense witness Ajit Jain additionally testified that petitioner told him in January 2009 that Rajaratnam had "swindled" him and that petitioner had lost his entire investment in Voyager. *Id.* at 1071. There was also documentary evidence that Rajaratnam had withdrawn $25 million from Voyager. *Id.* at 758-760.

petitioner was "furious" with Rajaratnam and therefore had no motive to provide him with inside information. But as explained above, the district court did not bar Geetanjali from testifying that petitioner was angry with Rajnaratnam—due to his treatment of the Voyager fund—at the time the inside information was communicated. See pp. 23-26, *supra*. Rather, it *allowed* her to make that point, and it simply precluded her from providing more specific information about the basis for his anger. *Ibid.*; Pet. App. 32a, 38a.

Second, petitioner argues (Pet. 28-29) that the district court abused its discretion by refusing to allow Geetanjali to testify without restraint, but subject to a limiting instruction directing the jury not to consider her testimony as evidence that Rajaratnam had in fact cheated petitioner. The district court reasonably exercised its discretion in concluding that such an instruction would have been ineffective in the particular circumstances presented here. The court recognized that the government would be unable to cross-examine Geetanjali about the underlying facts of the Voyager transaction. Pet. App. 37a. It also feared that the jury would be especially likely to believe petitioner's statements to Geetanjali about Rajaratnam's underlying conduct because she was his own daughter. *Id.* at 37a-38a. Given these concerns, the court of appeals correctly concluded that there was "no basis for second-guessing the district court's view as to the likely effect [of Geetanjali's testimony] on the jury." *Id.* at 38a.[12]

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[12] Petitioner notes (Pet. 28-29) that the district court issued limiting instructions with respect to testimony from other witnesses at the trial, including testimony addressing petitioner's anger with Rajaratnam over the Voyager fund transactions. But the court

Finally, petitioner contends (Pet. 30) that there would have been no harm even if the jury had erroneously accepted Geetanjali's testimony for the truth of her father's assertion that Rajaratnam had cheated him by taking money out of the Voyager fund. He argues (*ibid.*) that other witnesses had already testified that Rajaratnam had withdrawn money from the Voyager fund and that petitioner informed others that Rajaratnam acted without petitioner's knowledge. But the extent to which the jury would have credited that other evidence is unknown. In any event, as the court of appeals stated, "[petitioner's] very argument substantiates the district court's view that this aspect of the Geetanjali testimony, with its potential for the jury to infer that [petitioner] had in fact been cheated, would have been cumulative." Pet. App. 39a.

d. Petitioner asserts (Pet. 30-32) that the lower courts erred in characterizing Geetanjali's proffered testimony as "cumulative." But as the court of appeals made clear, the district court limited Geetanjali's testimony "based on its view that the jury would likely be unable to comprehend that the [challenged] statement could be considered only to show [petitioner's] belief and not to show the truth of what he believed." Pet. App. 34a. Although the courts below referred to the excluded evidence as "cumulative," it does not appear that either court treated that characterization as a necessary basis for excluding it from the trial. Petitioner himself acknowledges that that

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reasonably concluded that Geetanjali's testimony posed a unique danger of confusion. Pet. App. 37a-38a, 72a. In any event, the court's willingness to allow the other testimony underscores its commitment to ensuring that petitioner had a full and fair opportunity to present his defense.

characterization was not dispositive. See Pet. 30 (asserting that the court of appeals treated the "cumulative" nature of the evidence as "an alternative justification" for its exclusion).

In any event, neither this case nor any other decision from the Second Circuit establishes that evidence will be "cumulative"—and therefore inadmissible—"merely because of an overlap with other evidence." Pet. 32 (quoting 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 96, at 521 (2d ed. 1994)). Petitioner is wrong (*ibid.*) to characterize the decision below in that fashion, and he is also wrong to suggest that the court of appeals applied a legal standard that is any different from the one applied by the other courts of appeals.

e. Petitioner also asserts that the decision below ignores the rule that "when reviewing decisions to exclude [evidence] under Rule 403, the appellate court must 'look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.'" Pet. 32-33 (quoting *United States* v. *Russell*, 971 F.2d 1098, 1106 (4th Cir. 1992), cert. denied, 506 U.S. 1066 (1993)). But there is no doubt that the Second Circuit applies the same rule as its sister circuits. See, *e.g.*, *United States* v. *Rubin*, 37 F.3d 49, 53 (1994) ("In reviewing a challenge to a Rule 403 balancing, we must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.") (citation and internal quotation marks omitted). Although the court of appeals did not invoke this rule explicitly, nothing in the court's opinion states or implies that the court was departing from circuit precedent or

the legal standard applied by the other courts of appeals.

f. In any event, this case is not a suitable vehicle for further review because of the court of appeals' alternative and independent holding that any such error was harmless. The court of appeals reached that conclusion—correctly—only after extensively analyzing the various factors for assessing prejudice to a defendant from the exclusion of evidence outlined in *United States* v. *Oluwanisola*, 605 F.3d 124, 134 (2d Cir. 2010). See Pet. App. 40a-46a. Petitioner does not challenge the court of appeals' harmless-error analysis in either of his questions presented, and it independently supports the judgment, making it unnecessary to consider whether the district court's evidentiary ruling was erroneous.

The conclusion that any error was harmless is correct. The evidence of petitioner's guilt was overwhelming. At trial, the prosecution established that petitioner called Rajaratnam moments after receiving confidential information about Goldman Sachs and that Rajaratnam then acted at the earliest opportunity to trade in massive amounts of Goldman stock. See pp. 3-5, *supra*. That was "powerful evidence that Rajaratnam was given the confidential information by [petitioner]." Pet. App. 46a. That evidence was confirmed by Rajaratnam's subsequent statements to his business associates Horowitz and Lau that he had made the relevant trades after receiving inside information. *Id.* at 6a-8a, 10a-13a, 46a.

Furthermore, "the record easily establishes that [petitioner] was able * * * to advance his defense" that his relationship with Rajaratnam had so deteriorated that he would not have assisted Rajaratnam by

tipping him with confidential information. Pet. App. 43a. In his closing argument, petitioner's counsel highlighted the testimony of two witnesses claiming that "Gupta believed Rajaratnam had cheated him, along with documentary evidence that Rajaratnam had in fact withdrawn $25 million from Voyager and a tape-recorded conversation in which Rajaratnam stated he had not told Gupta about the withdrawal." *Ibid.*; see *id.* at 43a-45a (extensively quoting the defense closing argument). Petitioner's counsel also invoked Geetanjali's testimony as proof that petitioner "was very upset about how he had been treated by Mr. Rajaratnam"—with respect to the Voyager transaction—"as early as September 20." *Id.* at 45a (quoting Tr. 3271). The district court's evidentiary ruling had no material impact on petitioner's ability to present his main defense theory.

In short, the district court's determination that the government proved petitioner's guilt to a "virtual certainty" was sound. C.A. App. 1635. The court of appeals thus concluded that any error with respect to the narrow constraints placed on Geetanjali's testimony was harmless. That alternative holding was plainly correct, and petitioner does not even attempt to challenge it here in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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