NO. 17-6781

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID LYNN JORDAN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether Petitioner failed to prove that his trial counsel were ineffective for withdrawing a previously filed motion for change of venue.

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The opinion of the Tennessee Court of Criminal Appeals affirming the denial of Petitioner's petition for post-conviction relief (Pet. App. A) is unreported, but may be found at *Jordan v. State*, No. W2015-00698-CCA-R3-PD, 2016 WL 6078573 (Tenn. Crim. App. Oct. 14, 2016).

STATEMENT OF JURISDICTION

The order of the Tennessee Court of Criminal Appeals was filed on October 14, 2016. (Pet. App. A at 1.) Petitioner filed an application for permission to appeal to the Tennessee Supreme Court, which was denied on July 19, 2017. (Pet. App. C.) Justice Kagan granted Petitioner an extension of time until November 16, 2017, within which to file a petition for a writ of certiorari. *Jordan v. Tennessee*, No. 17A332 (U.S. Sept. 25, 2017). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). (Pet. 1.)

STATEMENT OF THE CASE

On January 11, 2005, Petitioner David Lynn Jordan went to the Tennessee Department of Transportation facility in Jackson, Tennessee, where he shot his estranged wife and four of her colleagues. 2016 WL 6078573, at *1. The State's evidence included numerous eyewitness accounts and Petitioner's confession. *Id.* at *3-5, 10-11. Because there was no question that Petitioner had pulled the trigger and was at the scene, his attorneys, George Googe and Lloyd Tatum, presented a mental state defense focused on Petitioner's alcohol intoxication, use of alprazolam, depression, lack of sleep, and a variety of other stressors. *Id.* at *22, 27.

That defense was unsuccessful, and Petitioner was convicted of three counts of first-degree premeditated murder, two counts of felony murder, two counts of attempted first-degree murder, two counts of aggravated assault, and one count of leaving the scene of an accident. *Id.* at *1. At

a separate sentencing hearing, the jury found that each first-degree murder was accompanied by no fewer than four aggravating circumstances. *Id.* The jury imposed the death penalty for all three convictions. *Id.* Petitioner's direct appeal was unsuccessful. *See State v. Jordan*, 325 S.W3d 1, 15-16 (Tenn. 2010).

Petitioner filed a petition for post-conviction relief in which he pressed some thirty-three claims of ineffective assistance of counsel. 2016 WL 6078573, at *56-77. These included claims that counsel were deficient for filing but later withdrawing a motion to change venue, and for inadequately conducting voir dire. *Id.* at *56-58. At an evidentiary hearing, Petitioner presented the deposition testimony of Dr. Edward Bronson, a venue expert, to support his claims. *Id.* at *47-49.

Dr. Bronson examined the pretrial publicity in Petitioner's case. *Id.* at *48. He identified fifty-eight articles in the Jackson-area press, which "was a lot, but not a super amount as you would get in some of the really famous cases." *Id.* He found a lot of inflammatory terms in the press coverage. *See id.* "There was almost nothing that, in any way, showed that he wasn't guilty or there were major extenuating circumstances or serious defects that he might have, at any stage of the case." *See id.* The victims were portrayed very sympathetically, while Petitioner was viewed "as a mean person with a domestic violence history, almost maniacal behavior at the crime scene, including an escape attempt." *Id.*

Dr. Bronson considered trial counsel to have performed deficiently with respect to venue. *Id.* at *47. He believed that they should have conducted a survey and some kind of content analysis of the media. *Id.* Additionally, Dr. Bronson concluded that withdrawing the motion for change of venue on the basis that Petitioner's father was viewed favorably in the community was an error given that counsel did not call the father as a witness. *Id.*

Dr. Bronson also faulted counsels' conduct of voir dire. Dr. Bronson believed that the questions asked in voir dire were conclusory; "you can't simply ask, will you follow my instructions, or will you put aside any prejudice you have, when you don't even know what the prejudice might be." *See id.* at *48. In his view, counsel should have used voir dire to explain how issues such as mental defect, use of drugs and alcohol, and domestic violence played into the case. *See id.* Dr. Bronson further noted that the juror questionnaire had only two questions on the death penalty. *Id.* He concluded that counsels' performance "was woeful both the questionnaire I mentioned, and some aspects of the questioning." *See id.*

Lead counsel George Googe testified concerning the decision not to pursue a change of venue. On December 19, 2005, he had filed a motion for a change of venue, alleging that local media had carried sensational stories and rumors. *Id.* at *21. He withdrew the motion on February 13, 2006. *Id.* He explained:

> We had a meeting of our defense team. I think Mr. Tatum was involved in it and Glori Shettles as well, and I also talked to the Defendant's parents and the Defendant, Mr. Jordan, and discussed whether we should pursue the change of venue or go ahead with a Madison County jury, and for certain reasons, mainly the fact that his dad was well-known, his family was well-known, they were good people, they were members of the – the Defendant's family were good members of the community, we felt like we'd have just as good a shot at a fair jury here as we would elsewhere, bearing in mind, a lot of times when venue is changed and they bring in jurors cold, a lot of the experiences with those juries are that they just – from anecdotal talking about this with other attorneys, that those jurors feel it's a very serious case or they wouldn't have been brought in. So we did a good bit of discussion and just made what I call a tactical decision to withdraw it.
>
> Now, it was understood that if we went to trial tried to choose a jury and were unable to get a fair and impartial jury during the voir dire process, that the Court would recess and try a change of venue instead.

(R. vol. 38, at 200-201); *see also* 2016 WL 6078573, at *21, 22. Mr. Googe acknowledged that he did not conduct a venue study to determine the level of saturation of publicity and pre-formed beliefs in Madison County. 2016 WL 6078573, at *21.

Mr. Googe also acknowledged that he did not retain a jury consultant, saying "I'm not sure I was aware it was common. I knew some people did it at that point." *See id.* He explained that he had proposed a lengthy jury questionnaire, but that the trial court issued its own. *Id.* at *22. At voir dire, Mr. Googe's tactic was to select people in the community who had knowledge of Petitioner's family. *Id.* at *23. The trial court conducted a general voir dire, and then individual voir dire on the matters of the death penalty and pretrial publicity. *Id.* The trial court first questioned prospective jurors, followed by the State, and then the defense. *Id.* All jurors said that they could be fair and impartial and that they could consider all forms of punishment. *Id.* Some jurors had heard something about the incident, but none had any specific information. *See id.*

Petitioner did not testify at the evidentiary hearing concerning his part in the decision not to pursue a change of venue. *See id.* at *18-54. *But see* Tenn. Code Ann. § 40-30-110(a) (providing that a petitioner "shall appear and give testimony at the evidentiary hearing if the petition raises substantial questions of fact as to events in which the petitioner participated, unless the petitioner is incarcerated out of state"). No juror was called to testify about exposure to publicity. *See* 2016 WL 6078573, at *18-54.

The post-conviction trial court denied relief, ruling that voir dire:

> properly inquired whether jurors could set aside what they may have heard about the case and render a verdict based only upon the evidence presented and the law as provided to the jury by the court. All jurors who had heard or seen some of the pretrial publicity stated they could set aside what they had heard or read and follow the law. Petitioner has presented no evidence to contradict their assertions.

(Pet. App. B at 82.)

Petitioner appealed. Before the Tennessee Court of Criminal Appeals, he repeated his claims that counsel were ineffective for failing to pursue a change of venue and adequately conduct

voir dire, and he added that the trial court should have changed venue sua sponte. *See* 2016 WL 6078573, at *56-58, 77. The Court of Criminal Appeals affirmed. *Id.* at *1, 86.

As for Petitioner's freestanding claim that venue in Madison County violated due process, the court concluded that this was a claim of trial court error that could have been raised on direct appeal, and was therefore waived. *Id.* at *77. Repeating the lower court's finding that "the jurors who had been exposed to pretrial publicity stated that they could set aside anything they had heard or read and base their decision on the evidence presented at trial and the law as instructed by the trial court," the court found that counsel were not ineffective respecting voir dire. *Id.* at *57. "There is no evidence establishing that the jury ultimately empaneled was biased or unfair." *Id.*

The court rejected Petitioner's claim that counsel were ineffective for withdrawing their motion to change venue for similar reasons. *Id.* at *56. Citing this Court's decision in *Murphy v. Florida*, the court observed, "Qualified jurors need not . . . be totally ignorant of the facts and issues involved." *Id.* (internal quotation marks omitted; alteration in original). It ruled:

> The majority of the jurors stated during individual voir dire that while they heard about the offenses as a result of publicity, they could not recall details of the offenses. As the post-conviction court later found in its order, "All the jurors who had heard or seen some of the pretrial publicity stated they could set aside what they had heard or read and follow the law. Petitioner has presented no evidence to contradict their assertions."

Id. Consequently, the court concluded, Petitioner had "failed to establish that any deficiency resulted in prejudice." *Id.*

Petitioner now seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

Having failed to prove prejudice below, Petitioner contends that the Court of Criminal Appeals erred in not presuming it. (Pet. 26-28.) Certiorari review of this contention is unwarranted for three reasons. First, the law governing prejudice in direct appeals from denials of motions to change venue is well-settled; Petitioner's question merely asks the Court to apply this firmly established rule to the facts of his own case. Second, Petitioner's case is no direct appeal; it is a collateral attack on a conviction, and *Strickland v. Washington* places the burden of proving prejudice firmly on the Petitioner. Third, counsels' withdrawal of a previously-filed motion to change venue was plainly a tactical decision—and one taken in consultation with Petitioner and his family—making this case a poor vehicle for resolving any question of prejudice. The petition should be denied.

Petitioner likens his case to "this Court's landmark pretrial publicity cases," *Rideau v. Louisiana*, 373 U.S. 723 (1963), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). (Pet. 26.) But the Court has more recently made clear that these decisions indicate that a presumption of prejudice "attends only the extreme case." *Skilling v. United States*, 561 U.S. 358, 381 (2010). *Rideau*, the Court explained, involved a local television station's thrice broadcasting the accused's confession in a smaller community. *Id.* at 379. The Court held that "'[t]he kangaroo court proceedings' trailing the televised confession violated due process." *Id.* (quoting *Rideau*, 373 U.S. at 726-27). As for *Sheppard*, the Court noted that "'months [of] virulent publicity about Sheppard and the murder,' did not alone violate due process . . . ." *Id.* at 380 (quoting *Sheppard*, 384 U.S. at 354). Rather, the Court "upset the murder conviction because a 'carnival atmosphere' pervaded the trial." *Id.* (quoting *Sheppard*, 384 U.S. at 358).

In each of these cases, the Court concluded, "we overturned a 'conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage'; our decisions, however, 'cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process.'" *Id.* (quoting *Murphy v. Florida*, 421 U.S. 794, 798-799 (1975)). For this rule, the Court cited *Murphy v. Florida*. *Id.*

Murphy, of course, is the very decision that the Court of Criminal Appeals invoked in denying Petitioner relief here. 2016 WL 6078573, at *56. Consequently, his claim simply involves an asserted misapplication of that settled rule of law. There is no need for the Court to retread that ground, and that is particularly true given that Petitioner has no substantial claim that his trial was "utterly corrupted by press coverage." Unlike *Rideau*, Petitioner can point to no evidence that his interrogation was televised in the venue. And he certainly cannot claim that "newsman took over practically the entire courtroom" such that a "carnival atmosphere" pervaded his trial. *Sheppard*, 384 U.S. at 353, 358. Rather, Petitioner's post-conviction showing reflected that local print media took a significant interest in this mass murder case, and that "news stories about [him] were not kind." *Skilling*, 561 U.S. at 383; *see* 2016 WL 6078573, at *48. Even if Petitioner were challenging the trial court's refusal to order a venue change, no presumption of prejudice would arise. *See Skilling*, 561 U.S. at 385.

Petitioner, however, cannot contend that the trial court's failure to change venue violated due process in this collateral proceeding. The Court of Criminal Appeals found such a claim to have been waived for failure to present it on direct appeal. 2016 WL 6078573, at *48. Instead, Petitioner must show this his counsel were ineffective for failing to pursue the matter. On that score, Petitioner asserts that the lower courts "failed to apply the correct constitutional standard for a change of venue in determining that Mr. Jordan had not met the prejudice prong under

Strickland." (Pet. 14.) That claim is strange, since in the ordinary *Strickland* case, prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Petitioner has adduced no evidence of a reasonable probability of an acquittal or a lighter sentence had he been tried in a different venue.

Indeed, the Court has this year declined to employ a presumption of prejudice where a deficiency of counsel led to structural error. In *Weaver v. Massachusetts*, the Court held that, when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically. 137 S.Ct. 1899, 1911 (2017). That conclusion flowed both from the fact that not every public-trial violation will lead to a fundamentally unfair trial and from the finality concerns that attend ineffective-assistance-of-counsel claims. *Id.* at 1912. Holding Weaver to the presumptive burden of demonstrating that attorney error rendered the trial fundamentally unfair, the Court determined that he was not entitled to relief. *Id.* at 1911, 1913. In part, this was because Weaver made no showing that the potential harms flowing from a courtroom closure—such as jurors' lying during voir dire or misbehavior by courtroom officials—came to pass in his case. *Id.* at 1913.

Weaver's holding is confined to the failure to object to the closure of the courtroom during jury selection, *id.* at 1907, but the decision suggests that ineffective-assistance-of-counsel claims such as Petitioner's should not be subject to a rule of presumed prejudice. The potential harm flowing from pretrial publicity is that jurors will be unable to discharge their duties impartially. *See Skilling*, 561 U.S. at 378. Post-conviction petitioners have ample tools to demonstrate whether that harm has come to pass. Not only can they challenge the quality of voir dire, just as a claimant on direct review might, *see id.* at 386-99, but they also get a post-conviction evidentiary hearing.

See, e.g., *Busby v. State*, No. M2012-00709-CCA-R3-PC, 2013 WL 5873276, at *16 (Tenn. Crim. App. Oct. 30, 2013) (noting that "Petitioner did not prove that the failure to seek a change of venue was prejudicial to his defense because the testimony of the jurors at the post-conviction hearing does not reveal any improper or extraneous influence over the jury's decision"), *perm. app. denied* (Tenn. Mar. 5, 2014). For his part, Petitioner neither acknowledges the *Weaver* decision nor offers any developed argumentation why a presumption of *Strickland* prejudice is appropriate in ineffective-assistance-of-counsel claims challenging the failure to seek a change of venue. The petition is ill-suited for certiorari review.

Finally, counsels' decision here to withdraw a previously-filed motion for a change of venue was an avowedly tactical one. *See* 2016 WL 6078573, at *21, 22. Simply put, the defense in this mass murder case faced a difficult trial in whatever county it was conducted, and counsel believed the best course was to attempt to seat jurors who were familiar with Petitioner's family. *See id.* Strategic decisions of that nature are supposed to be "virtually unchallengeable." *Strickland*, 466 U.S. at 690. Further, counsel testified at the evidentiary hearing that they discussed the matter with Petitioner and his parents. 2016 WL 6078573, at *21, 22. Petitioner did not offer his own testimony to challenge this assessment. Thus, while the Court of Criminal Appeals resolved this claim solely on *Strickland*'s prejudice prong, a case in which the tactical nature of counsels' conduct is so manifest from the record is an odd candidate for this Court's attention. No writ should issue to address the question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, postage prepaid, to: Kelly A. Gleason, Assistant Post-Conviction Defender, J. David Watkins, Assistant Post-Conviction Defender, 404 James Robertson Parkway, Suite 1100, Nashville, TN 37219, on this the 15th day of December, 2017. I further certify that all parties required to be served have been served.

s/ James E. Gaylord
JAMES E. GAYLORD
Senior Counsel