No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSHUA KOMISARJEVSKY, *Petitioner,*

v.

STATE OF CONNECTICUT, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
CONNECTICUT SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

JOHN HOLDRIDGE
153 BOULEVARD HGTS
ATHENS, GA 30601
TEL: (917) 496-4267
FAX: (706) 850-0684
HOLDRIDGEJOHN@GMAIL.COM

ATTORNEY FOR PETITIONER

Counsel of Record

QUESTIONS PRESENTED

In *State v. Komisarjevsky*, 338 Conn. 526, __ A.3d. __, 2021 WL 1377338 (2021), the Connecticut Supreme Court affirmed the trial court's denial of the petitioner's two motions to change the trial venue out of the New Haven Judicial District.

In holding that the petitioner, Joshua Komisarjevsky, was not entitled to a presumption of prejudice, the court purported to apply the four factors considered by this Court in *Skilling v. United States*, 561 U.S. 358 (2010): (1) the size and diversity of the jury pool; (2) the prejudicial nature of the pretrial publicity; (3) the publicity's decibel level at the time of trial; and (3) the jury verdict, which *Skilling* said is "of prime significance." 561 U.S. at 382-384; 2021 WL 1377338 at *11-*13. The state court acknowledged that the prejudicial nature of the media coverage and its decibel level at the time of trial favored a presumption of prejudice, but reached its conclusion because: (1) the trial venue had a total population of 846,000; and (2) the jury selection process was "extensive," a factor which the court deemed "most significant," but which this Court in *Skilling* considered in its actual-prejudice analysis, not its presumption-of-prejudice analysis. 2021 WL 1377338 at *14-*16; 561 U.S. at 385-395. Regarding the jury verdict, the court held that because "our review of the record demonstrates that the evidence was overwhelming… we conclude that the jury's verdict [finding the petitioner guilty on all counts] does not support a finding of presumptive prejudice." 2021 WL 1377338, n.21 (*citing Luong v. State*, 199 So. 3d 139 (Ala. 2014)), *cert. denied*, 577 U.S. 1241 (2016), and *State v. Gribble*, 165 N.H. 1, 66 A.3d 1194 (2013)). Additionally, the court did not address the petitioner's contention that this Court's precedents required it to consider as part of its presumption-of-prejudice analysis the carnival atmosphere of the voir dire proceedings produced by the pretrial publicity.

The court also found that the petitioner did not suffer actual prejudice. 2021 WL 1377338 at *17. The court rejected the petitioner's argument that this Court's precedents require consideration of jurors' assertions of their own impartiality to include: (1) the emotional nature of the case and the prejudicial effect of the pretrial publicity; and (2) the difficulty of picking an unbiased jury.

The questions presented are:

1. What consideration, if any, must courts give the following factors in their presumption-of-prejudice analysis: (a) a verdict finding the defendant guilty on all counts; (b) the disruption to the solemnity and calmness of the proceedings caused by prejudicial pretrial publicity; and (c) the jury selection process?

2. In their actual-prejudice analysis, when evaluating jurors' assurances of their own impartiality. must courts consider: (1) the emotional nature of the case and the prejudicial effect of the pretrial publicity; and (2) the difficulty of picking an unbiased jury?

LIST OF PARTIES

The Petitioner (the defendant below) is Joshua Komisarjevsky, who is currently incarcerated at SCI Mahanoy, 301 Morea Rd., Frackville, PA 17932. Inmate number: MQ5469.

The Petitioner is represented before this Court by John Holdridge, Attorney-at-law, 153 Boulevard Hgts, Athens, GA 30601. Tel. (917) 496-4267, fax (706) 850-0684. holdridgejohn@gmail.com.

The Respondent (the plaintiff below) is the State of Connecticut and is represented by Melissa L. Streeto, Senior Assistant State's Attorney, Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067. Tel. (860) 258-5807, fax (860) 258-5828. DCJ.OCSA.Appellate@ct.gov; melissa.streeto@ct.gov.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Other Authorities

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSHUA KOMISARJEVSKY, *Petitioner,*

v.

STATE OF CONNECTICUT, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
CONNECTICUT SUPREME COURT

The petitioner, Joshua Komisarjevsky, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Connecticut.

OPINION BELOW

The judgment of the Connecticut Supreme Court in *State v. Komisarjevsky*, 338 Conn. 526, __ A.3d. __, 2021 WL 1377338 (2021), appears in the Appendix beginning at A1. The court's order denying the petitioner's Motion for Reconsideration appears in the Appendix beginning at A62.

JURISDICTION

The petitioner invokes the jurisdiction of this Court to grant the Petition for a Writ of Certiorari to the Connecticut Supreme Court on the basis of 28 U.S.C. § 1257. The Connecticut Supreme Court opinion upholding his convictions was issued on April

12, 2021. The court denied his Motion for Reconsideration on June 1, 2021.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> 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. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

The Crimes, the Trials, and the Resentencing. The trial of the petitioner's co-defendant, Steven Hayes, commenced in the New Haven Judicial District in September 2010, and concluded with six death sentences in November 2010. The New Haven Register reported on November 8, 2010, that Hayes' death verdict "climax[ed] one of the most notorious and closely watched criminal cases in Connecticut's history."

Four months later, in February 2011, the trial court denied the petitioner's first motion to sequester the jury. Tr. 2/24/11 at 88-106. Jury selection began in the petitioner's case the following month, and it concluded in June 2011. In September 2011, the trial judge denied the petitioner's second motion to sequester the jury. Tr. 9/12/11 at 20-25. Petitioner's trial began that month and concluded in December 2011.

At his trial, the petitioner was charged with "six counts of capital felony, Conn.

Gen. Stat. § 53a-54b; three counts of murder, § 53a-54a; four counts of kidnapping in the first degree, § 53a-92; one count of sexual assault in the first degree, § 53a-70; one count of burglary in the second degree, §§ 53a-102 and 53a-122; one count of arson in the first degree, § 53a-111; and one count of assault in the second degree, § 53a-60." *State v. Komisarjevsky*, 338 Conn. 526, __ A.3d. __, 2021 WL 1377338 *1 (2021).

According to the Connecticut Supreme Court, the petitioner's jury could have reasonably found the following facts. *Id*. at *2 -*5. "In 2007, the P family, consisting of W, …. J, his wife, … and their two daughters, seventeen year old H, and eleven year old M, lived in a house at 300 Sorghum Mill Drive in Cheshire." Early in the evening on July 22, 2007, the petitioner saw J and M in a Stop and Shop parking lot. "Intrigued by J's car, a Chrysler Pacifica, the defendant followed J and M to the P residence, and was further impressed by their apparent prosperity." Later that night, the petitioner "contacted [Steven] Hayes, with whom he had been communicating by text message about plans to make money in some way." At approximately 10 p.m., he and Hayes met at the same parking lot. "[T]he defendant remembered J and M from earlier in the evening and told Hayes about them."

Eventually, the petitioner and Hayes drove to the P's residence, "and donned rubber gloves and face masks improvised from cut up shirts and a hat. Hayes brought with him a pellet gun that he had purchased the day before at a nearby Wal-Mart while accompanied by the defendant…." At approximately 2 a.m., they "approached the P residence and walked around the house. They noticed that W was sleeping on a couch in the sunroom." The petitioner entered the house through an unlocked bulkhead door in the basement, where he found a baseball bat. He "repeatedly struck W in the

head with the bat…." Hayes aimed the pellet gun at W, and the petitioner "ordered W to lie down on the couch and covered his bleeding head with a towel; Hayes and the defendant bound W's wrists and ankles…." The petitioner told "Hayes to `put a bullet in'" W if he moved and told W "`if we get the money, nobody will be hurt.'" When asked, W told the petitioner about his wife and daughters sleeping upstairs. Hayes and the defendant went upstairs and tied up the wife and daughters.

By 4 a.m., the defendant and Hayes concluded "there was no money there, but they realized from the check register and receipts in J's purse that W and J had approximately $40,000 in their Bank of America accounts." The two decided to wait until the bank opened that morning, "at which point Hayes would take J there to withdraw $15,000, an amount that they believed would not raise a `red flag.'"

"Tensions arose between Hayes and the defendant" because Hayes was concerned that they had left traces of their DNA in the house. Hayes "proposed burning down the house and kidnapping the victims using the family's vehicles. A short time later, Hayes became angrier because he believed that the defendant had used his real name in front of the victims, and he proposed killing them instead." At approximately 8 a.m., Hayes drove the Pacifica to a nearby gas station and filled four windshield washer fluid containers with gasoline. Shortly before 9 a.m., Hayes and J drove in the Pacifica to a Bank of America branch. While Hayes stayed in the car, J informed a teller that "she needed to withdraw $15,000 because two men were holding her family hostage in their house." The teller relayed the information to the branch manager, who was told by J that the men "had been polite and had promised to free the P family upon receiving the money." The manager approved the withdrawal of $15,000 and notified

the police.

In the meantime, the petitioner went to M's bedroom "and, after some additional conversation, cut her clothes off and sexually assaulted her anally…. After committing the sexual assault, the defendant allowed M to shower and poured bleach on her shorts in an attempt to eliminate traces of his DNA."

After Hayes and J returned from the bank, Hayes and the petitioner "moved into the dining room and argued again about whether it was necessary to kill the family to avoid detection. Hayes … paced around the house to `psyche himself up.'" Hayes then went into the living room by himself, sexually assaulted J vaginally, and strangled her to death.

At around this time, W, who had been tied up in the basement during the night, freed himself. "Rather than confront the defendant and Hayes himself, W chose to escape the basement via the bulkhead door, and he crawled" to his next-door neighbor's house for help. The petitioner had heard W escape but "[i]nstead of chasing W, the [petitioner], who saw J's lifeless body on the living room floor, told Hayes that they had to leave immediately." Hayes gave the money to the petitioner and told him to start the Pacifica. "While the defendant looked for the car keys, he saw Hayes pouring copious quantities of gasoline from the windshield washer fluid containers around the house, including in the living room, stairways, hallway, and master bedroom…. Realizing that the police were starting to arrive and surround the house, the defendant started the Pacifica in the garage as Hayes flicked a lit match into the kitchen, igniting a pool of gasoline on the floor and causing flames to travel toward the front hallway of the house." H and M perished in the fire.

The police had created a perimeter around the house and immediately captured the petitioner and Hayes. "When questioned after being grabbed forcefully by … a Cheshire police detective, the defendant told the officers that there were no other accomplices, that he believed J was dead, and that there were `two girls in the upstairs ... front facing bedrooms, and that they were still alive.'" Afterwards, "the defendant waived his rights and gave a detailed statement to the investigating officers, … which was admitted into evidence at trial. "

At trial, the petitioner argued that he was not guilty of the capital felony and arson charges[1] based on the following evidence: (1) he consistently denied in his otherwise highly incriminating confession that he intended to kill[2] the victims or participated in killing them,[3] or that he poured any gasoline in the house; (2) Hayes took J to the bank; (3) Hayes raped and strangled J; and, (4) Hayes purchased the gasoline, poured it throughout the house and lit the match[4] that set the house on fire, killing H and M

The jury rejected these arguments, found him guilty on all counts, and returned six death verdicts. Subsequently, in *State v. Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), the Connecticut Supreme Court held that the death penalty was unconstitutional

---

[1] He also disputed that he had sexually assaulted M anally, rather than orally as he had confessed.

[2] *See* Conn. Gen. Stat. § 53a-54a ("A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person…").

[3] In his statement, the petitioner explained that he was surprised when Hayes mentioned purchasing gasoline, and "stunned and perplexed" when Hayes talked about burning down the house after removing the family. Tr. 9/21/11 at 176-177. When Hayes said that they had to burn down the house with the family in it, the petitioner told him he was not killing anyone. Tr. 9/22/11 at 22, 29.

under the state constitution, and, on July 26, 2016, the trial court vacated the death sentences and resentenced the petitioner "to a total effective sentence of six consecutive sentences of life imprisonment without the possibility of release, followed by a term of imprisonment of 140 years." 2021 WL 1377338 at *5.

2. Prejudicial Pretrial Publicity and Community Bias. The Cheshire murders sent New Haven into paroxysms of inquisitional paranoia and communal hysteria. In finding that the pretrial publicity weighed in favor a presumption of prejudice, the Connecticut Supreme Court provided some examples of the "lynch mob mentality" produced by the media saturation:

> … some of the coverage in the media in the present case went beyond the reporting of even the most disturbing facts and, instead, was at times evocative of the "lynch mob mentality" or "[community wide] rush to judgment" identified by the United States Supreme Court as being sufficiently prejudicial to trigger a presumption of prejudice. (Internal quotation marks omitted.) *State v. Gribble*, [165 N.H. 1, 27, 66 A.3d 1194 (2013)]. Commentary from a bipartisan array of prominent political figures made clear the extent to which this case affected the debate about criminal justice public policy and, particularly, the death penalty. Most graphic were the widely reported comments of Senator Prague, who … was a formerly ardent death penalty opponent who changed her position on the issue after meeting with W, and then stated for the public record—while jury selection was ongoing in this case—her widely reported view that the defendant should be hanged in a public street by his genitalia. Indeed, then Governor M. Jodi Rell specifically cited this case in vetoing legislation repealing the death penalty. See Connecticut Executive Branch, Press Release, Governor Rell Vetoes HB 6578, An Act Concerning the Penalty for a Capital Felony (June 5, 2009)…. Similarly, former Governor Dannel Malloy stated in his 2010 campaign for office that he would support legislation prospectively repealing the death penalty, with a prospective only repeal aimed specifically at ensuring the executions of the defendant and Hayes. In our view, targeted public commentary of this ilk—above the line from the comments section and made by prominent public officials—is sufficient to tip the press coverage *Skilling* factor in the defendant's favor, even accounting for the twenty-first century reality of the omnipresent media coverage of notorious criminal cases. (2021 WL 1377338 at

[4] The trial court prohibited the prosecution from claiming that the petitioner had lit the match because it had argued at Hayes' trial that Hayes had done so.

*15.)

Although this case received publicity throughout the state, the media saturation was far greater in New Haven.[5] An expert retained by the defense, Dr. Steven Penrod, a distinguished professor at John Jay College of Criminal Justice, reported that a Nexis search he conducted found "440 articles about the case had been published in the New Haven Register, 81 in the Danbury News-Times, 81 in the Connecticut Post [from Bridgeport, in Fairfield County], and 81 in the Fairfield Citizen." CE C (2/23) (Penrod Report (text accompanying Table 31)); Tr. 2/23 89-90. New Haven residents "have had much greater access to newspaper articles about the event compared to" residents in Fairfield, Stamford, Norwalk and Danbury, the other judicial districts Penrod had examined in a public opinion survey. CE C (2/23) (Penrod Report (text accompanying Table 31)). Close to 70% of New Haven respondents to his survey followed the case very closely or somewhat closely, while less than 49% of respondents in Stamford/Norwalk did so. CE C (2/23/11) (Penrod Report (Table 31)); Tr. 2/23/11 at 88-89.

The media bombarded the New Haven community with numerous prejudicial allegations that were not admitted at the petitioner's trial, including: (i) the petitioner's offer to plead guilty in exchange for a life sentence; (ii) his prior convictions; (iii) his parole status at the time of his arrest; (iv) statements made by Hayes blaming the petitioner for planning and orchestrating the crimes and for directing him to kill J; (v)

[5] The New Haven Judicial District is part of the Hartford/New Haven media market. In his motions to change venue, the petitioner sought to have his trial moved to the Fairfield, Stamford, Norwalk or Danbury judicial districts, which are all a part of the New York media market.

highly incriminating and deeply disturbing journals and letters written by the bipolar[6] petitioner which the trial judge allowed Hayes to introduce to show the defendant's "relative evil."[7]**;** (vi) pronouncements by Hayes' attorney that the petitioner was the mastermind of the crimes[8]; (vii) Hayes' convictions and six death sentences; (viii) Hayes' acquittal on the arson count[9]; and, (ix) death threats made against the petitioner's parents, his 9-year-old daughter, his daughter's guardian, and some of his friends. Additionally, the media continually reported that the petitioner had confessed, but failed to inform the public that in his confession he consistently denied any intent to kill or commit arson.[10]

On December 26, 2010, the New Haven Register named WP its person of the year and, two days later, the Cheshire home invasion was named the top crime story of 2010. On December 30, 2010, New Haven television station WTNH named the Hayes'

---

[6] A psychiatrist testified at the petitioner's sentencing phase that he suffered from childhood onset rapid cycling bipolar disorder.

[7] The New Haven Register published a link to the journals.

[8] The New Haven Register reported on Hayes' attorney's closing argument in great detail, including: "`At every critical junction, when the plans changed it was because Joshua Komisarjevsky escalated the level of violence…. The sociopath or psychopath in this case is Joshua Komisarjevsky, not Steven Hayes."

[9] As The New Haven Register reported, "[t]he only good news [Hayes] received was the acquittal for first-degree arson. Prosecutors failed to prove Hayes, who admitted pouring gasoline in the Petit home, lit the match that ignited it." The media conjectured that the jurors had concluded that Hayes had, "at least in the arson aspect of this crime, played a secondary role…." It repeated earlier reports that a prison officer had testified that Hayes had admitted pouring gasoline on the stairs but did not believe he could be charged with arson because he did not light the match. "Jurors apparently agreed."

As explained *supra*, the trial judge had prohibited the prosecution from claiming that the petitioner had lit the match because it had argued at Hayes' trial that he had lit the match.

[10] The media also reported on other incriminating allegations such as the petitioner's capture at the crime scene that were admitted at trial but were nevertheless prejudicial because they contributed to the community's rush to judgment.

trial the top story of 2010. On January 1, 2011, the Register reported that 5 out of the top 10 videos viewed at newhavenregister.com concerned the Cheshire case.

3. The petitioner's first change of venue motion. In February 2011, the petitioner filed a motion to change venue from the New Haven Judicial District, offering as alternatives the Stamford, Norwalk, Fairfield and Danbury judicial districts.[11] At a hearing on the motion, Penrod testified that in January he conducted a public opinion survey about the case in the five judicial districts. Tr. 2/23/11 at 29, 31, 33-34. He testified that the prejudice against the defendant in New Haven, "in terms of recognition" and "judgments about his guilt," were the "highest numbers I've ever seen." *Id.* at 44, 45. A little over a year before, Penrod had conducted a survey for Hayes' defense team, and the results were "about 20 percent" less prejudicial. *Id.* at 34-35.

Over 99% of New Haven respondents "recognized the case," and over 90% had prejudged the defendant guilty, prejudged that he should receive the death penalty, or expressed bias against him. *Id.* at 50, 73, 91; CE C (2/23/11) (Penrod Report (Tables 32, 23) (text accompanying Figure 4)). Yet, only 60% admitted that they were somewhat biased against him, demonstrating that "merely asking venirepersons whether they are biased will not provide a true estimate of prejudice against the defendant." *Id.*

Although the trial court acknowledged that the case had garnered "tremendous

---

[11] The Connecticut Supreme Court held that whether the petitioner could have received a fair trial in any of these alternatives is "not directly relevant to whether the defendant could get a fair trial in New Haven…." 2021 WL 1377338 at *16, n.30.

publicity,"[12] it denied the petitioner's motion. *State v. Komisarjevsky*, No. CR07241860, 2011 WL 1168532 (Feb. 28, 2011). It ruled that the defendant could renew the motion based on how the voir dire proceeded. 2011 WL 1168532 at *4.

4. The voir dire proceedings. Jury selection took three months. In a preliminary charge, the court instructed prospective jurors that, "I know that many or all of you have been exposed to" publicity about the case and "I want to assure you that you're not disqualified from serving on the jury just because you might have heard about the case." See, e.g., Tr. 5/25/11 at 5. Nevertheless, over two hundred prospective jurors immediately conceded that they could not be fair to the defendant and were excused for cause.

The voir dire proceedings had a definite carnival atmosphere. The Connecticut Supreme Court's opinion provides just a small sample of the chaos that marked them:

> Questioning during voir dire revealed that some prospective jurors had discussed with each other their distaste for the defendant, including a belief that he should immediately receive the death penalty. Other prospective jurors became emotional, with some refusing to enter the courtroom and others berating the defendant and openly stating their beliefs, either in open court or to court staff, that the defendant should "fry," or offering to execute him personally. For example, one prospective juror, J.M.-M., after being peremptorily challenged by the defendant, screamed at him and called him a "[k]iller, asshole." Another, B.G., after being excused for hardship, offered to "take care of him right here." Similarly, two alternate jurors, D.V. and J.B., who had been selected based on their assurances that they could withstand pressure and decide the case impartially, were stricken from the panel after they returned to court to express concern about their impartiality after

[12] Again, this case received publicity throughout the state. However, as demonstrated by the media saturation in New Haven, Penrod's testimony and report, and the voir dire in this case, residents in the New Haven J.D. paid far greater attention to the case than other state residents. *Cf. United States v. McVeigh*, 918 F.Supp. 1467, 1471 (W.D. Okla. 1996) (granting change of venue in part because of greater interest and "informational needs" of local citizens); *State v. Marshall*, 123 N.J. 1, 586 A.2d 85, 120 (1991) (trial court changed venue because even though the pretrial publicity would be extensive in other counties "there is inordinate and continuing interest of the people of this county in this case…."), *cert. denied,* 507 U.S. 929 (1993).

friends and coworkers had questioned them about the case and offered unsolicited opinions. (2011 WL 1168532 at *10.)

Seated Jurors. Of the 18 seated jurors: (i) six had prejudged that the defendant was guilty; (ii) the vast majority had substantial knowledge of the case (or thought they did); and, (iii) many had been informed by spouses, parents, other family members, other prospective jurors, friends, co-workers and/or others in the New Haven community that the defendant was guilty and/or should be sentenced to death. They all assured the trial court that they could be fair, and the trial court believed them. They were:

R.F. Asked whether he had a preconceived idea of the defendant's guilt prior to coming to court, R.F. replied: "Probably I would think he was guilty from what I've read in the paper and what I've seen on T.V." Tr. 4/20/11 at 234. He had discussed the case with his family and co-workers, "[l]ike how gruesome it was." *Id.* at 212. His parents – with whom he lived -- "voiced opinions about it's a pretty much open and shut case…." *Id.* at 229-230. He stated that he believed the community was "just angry and want[ed] to see a conviction… from what I've felt and heard." *Id.* at 230-231. "Some co-workers have voiced opinions. You know, thrown in jail or, you know, the death penalty." *Id.* at 231. One co-worker said "he was going to sleep with a hammer by his bed." *Id.* at 233-234. Asked whether he would find it difficult to "actually push all that aside, what your parents have said, your co-workers have said and what you've read," he responded: "Yeah, it could be difficult." *Id.* at 231. During the general questioning, he had seen two women leave crying. *Id.* at 233. R.F. stated that he had been following the case "pretty much [since] day one. I remember talking about it in

the break room at work for my job at the time." *Id.* at 209. He had read about it "many times" and followed it "closely." *Id.* at 209, 210, 226. He knew that Hayes had been convicted and had received a death sentence. *Id.* at 211-212. Regarding the books that had been written about the case, he said: "I've seen them in the bookstore. I flipped through them a couple of times. I never actually read it though." *Id.* at 21.

L.K. If L.K. had been asked prior to her jury duty whether she presumed the defendant innocent, "I think my answer probably would have been, I mean, based on the evidence that I felt at that time and the fact that someone else – you know the other person was convicted probably would be that he probably was guilty, but that, you know, he hasn't been tried." Tr. 4/28/11 at 99-100. She stated that she had spoken with others about the case because it is "a very big case," and "I think the community wants justice." *Id.* at 101-102. L.K. had extensive knowledge of "the details" of the case. *Id.* at 64, 65. She knew that Hayes was convicted and "I believe he was sentenced to death." *Id.* at 66, 95. Asked whether she had "an understanding of who did what in that house that night," she responded: "I know that it was talked about, but I don't recall… I mean, -- I think it was something that I knew at some point. You know it might be one of those things w[h]ere, it's like, if you read it again it would, like, come back, but I just --- I can't recall at this point." *Id.* at 94.

T. M.-T. Asked whether she had believed the defendant was guilty, T.M.-T. responded: "Well, the fact that he was caught on the scene, you know, if that's true, which I, you know, that I've heard, but if he was caught on the scene, then yes." Tr. 3/23/11 at 84. She reported that prior to her questioning other jurors had been discussing the case, saying among other things that "the two men that participated…,

they're evil, things like that." *Id.*, 78. When the court asked "was this upstairs or was this down here?," she responded: "Both." *Id.* at 79. She stated that the other jurors had stated that the defendant and Hayes "were caught red-handed," and so were guilty. *Id.*, 79-80. She had seen WP on the news "[g]osh, quite a bit." *Id.* at 85. Asked if WP's presence at the trial would "influence your decision at all," she responded: "It might...." *Id.*, 86. She agreed that the case "has been a big conversation with people who live in New Haven," and part of that was the intensity of the media coverage. *Id.* She had heard plenty of people express the opinion that the defendant should die. *Id.* at 97. She had extensive, if at times erroneous, knowledge of the facts of the case. *Id.* at 83. She knew that Hayes had received a death sentence and had heard nothing favorable about the defendant. *Id.*, 91-92.

C.H. (alternate) agreed that prior to her jury duty she probably would have said that Joshua Komisarjevsky was guilty. Tr. 5/25/11 at 155. Although she had not discussed the case with anyone "recently," in her prior conversations, most people said that the defendants should receive the death penalty. *Id.* at 153. Asked whether she heard anything "about who it was who bought the gasoline," she responded: "I – I don't think it's right to – to murder –", and then the court interrupted her. *Id.* at 151. Asked whether she would hesitate to vote for a life sentence if she concluded that it was appropriate "even though many people think that… death is the appropriate punishment," she responded: "I wouldn't have a problem changing." *Id.* at 153-154. She also stated that "I would have to take [the Ps'] opinions into consideration" when reaching her verdict. *Id.* at 180. C.H. had significant knowledge about the case. *Id.* at 137-141. The defense unsuccessfully challenged her for cause. *Id.* at 191-192.

C.T. (alternate) stated that "[b]ased on what I heard on television, I would say that there's a very big likelihood of him being guilty...." Tr. 5/25/11 at 78. She stated that she felt victimized herself by the crimes because of their proximity to her house and because they were so horrific, although she stated she did not feel personally frightened or threatened. *Id.* at 99-100. She reported that she had spoken to her family and friends about the case and that the most prevalent opinion was that the defendant was guilty. *Id.* at 77, 85. No one said he might be innocent or that he should receive a fair trial, and she had not done so because of the horrific nature of the crimes and because how the community felt. *Id.* at 85-87. She had extensive, if at times erroneous, knowledge of the case, including that Hayes had been convicted and sentenced to death *Id.* at 89, 91-92, 94. She had heard nothing in the news reports that was favorable to the defendant. *Id.* She remembered reading about the defendant's criminal background, that he "was recently paroled." *Id.* at 90. The defense unsuccessfully challenged her for cause. *Id.* at 128-130.

C.J. (alternate) stated that she was "well versed on what happened in the case," and knew that "the two gentlemen were apprehended trying to get away." Tr. 5/31/11 at 40-42. She explained that "I know that they were apprehended. I mean, I would have to listen to all the particulars to come to some logical conclusion, but I am aware of what the media said has happened and [the defendant] was arrested and incarcerated." *Id.* at 42-43. She stated: "I'm an avid person that watches the news so I'm just well aware of the particulars that were told in the media." *Id.* at 42. She knew about a female legislator's comments about the case, which "I don't think was too appropriate." *Id.* at 56. Asked "do you think you would make your decision as a juror

just by what [the legislator] said?" she responded: "As you indicated, I would have to put that all on the back burner. Of course, I'm conscious of what was shown in the media. But sitting here or sitting in this court proceeding I would have to be very open-minded and try to maintain a fair view of what's going on." *Id.* at 57. Asked whether she had read anything about the relative culpability of the defendant and Hayes, she replied: "Well, like I said, I only saw what was in the news...." *Id.* at 71. She had not read anything good about the defendant. *Id.* at 72-73. The defense unsuccessfully challenged her for cause. *Id.* at 89-90.

K.A. had discussed the case with her husband who brought it up "intermittently." Tr. 4/4/11 at 3, 17. He had "assumed" the petitioner was "guilty." *Id.* at 19. He had "just felt heartbroken for the events that took place and for the family that was torn apart." *Id.* at 18. Although a "pretty religious Catholic," her husband was "comfortable" with the decisions in the Hayes' case, including his death sentence. *Id.*

V.K. Before appearing for questioning, V.K. had heard other jurors talking about the case and the comments were "mostly negative." Tr. 4/7/11 at 31. The common theme mostly was "they felt he was guilty." *Id.* at 32. Additionally, "I think that everyone" in the community "thinks he's guilty." *Id.* at 36. V.K. knew that Hayes had been convicted. *Id.* at 7-8.

M.B. had discussed the case with her husband and "he would be harsh in his punishment…." Tr. 4/13/11 at 143. Asked whether she remembered reading anything about the circumstances under which the defendant was arrested, M.B. responded: "Yes, directly after he – he left the house." *Id.* at 111. She had a great deal of knowledge about the media coverage. *Id.* She knew Hayes had been convicted. *Id.* at

111-112.

L.C. stated that "I'm sure there is – must be a sense in the community of wanting some sort of retribution for the deaths of, you know, a woman and her two children." Tr. 4/19/11 at 155. She knew about Hayes's conviction. *Id.* at 137, 138.

M.N. stated that "clearly I've heard of this case, and when it first happened, I read about it in the news and saw some stories on TV." Tr. 3/17/11 at 92. He knew the petitioner's name and did not know anything about his character or background "other than what I read in the paper." *Id.* at 109.

T.A. knew about the case, including Hayes' conviction and death sentence. Tr. 3/21/11 at 189-190; 207-208. His brother had expressed his opinion of the case to him "3 or 4 months ago," although he claimed he did not remember the opinion. *Id.* at 210-211.

S.H. had "heard a lot about the case but nothing recently," and stated that "I do know the specifics of it… or I believe I know." *Id.* at 111.

J.H. knew some of the facts of the case. Tr. 5/5/2011 at 14. She believed that Hayes had been found guilty. *Id.* at 15. She discussed the case with family members when it first happened, "just to be very sympathetic." *Id.* at 16.

C.A. stated: "I remember there was a lot of attention, a lot of media coverage, a lot of articles, a lot of play in the news about it.... There was a home break-in, people were killed, a wife and daughters were killed, the house was set on fire, and that's relatively as far as I know…" Tr. 5/10/11 at 46, 55. He added: "[I]t was a, you know, a very very heinous crime…" *Id.*

Use of peremptory challenges. The petitioner used the vast majority of his

40 peremptory challenges[13] on venire members who indicated they were biased against him, including 12 jurors whom he had unsuccessfully challenged for cause.[14] Even the state apparently used two of its peremptories on jurors because of their bias against the defendant.

5. The petitioner's second change of venue motion. After jury selection ended in June 2011, the petitioner moved to strike the jury and change venue. Tr. 9/16/11 at 24-43. He recited the chaotic events of the voir dire proceedings and explained that the seated jurors would be unable to vindicate his constitutional rights to a fair and impartial jury. The trial judge denied the motion.

6. The petitioner's direct appeal. In his direct appeal to the Connecticut Supreme Court, the petitioner argued, among other issues, that the trial court erred by denying his motions to change venue. He contended that under *Skilling v. United States*, 561 U.S. 358 (2010), and other precedent from this Court and other courts he was entitled to a presumption of prejudice and that he suffered actual prejudice.

In holding that the petitioner was not entitled to a presumption of prejudice, the Connecticut Supreme Court stated that it was applying the four factors considered by this Court in *Skilling*: (1) the size and diversity of the venue; (2) the prejudicial effect of the pretrial publicity; (3) the publicity's decibel level at the time of trial; and (3) the jury verdict. 561 U.S. at 382-384; 2021 WL 1377338 at *11-*13. The court ruled that

---

[13] Both parties used all 40 of their peremptories. The trial court denied the petitioner's request for more. Tr. 7/9/11 at 156-170.

[14] The petitioner raised the denials of these cause challenges on direct appeal, but the Connecticut Supreme Court held "that any error with respect to challenges for cause was harmless because none of the challenged jurors actually decided his guilt." 2021 WL 1377338 at *28-*29.

the prejudicial nature of the media coverage and its decibel level at the time of trial favored a presumption of prejudice, but reached its conclusion because: (1) the trial venue had a total population of 846,000; and (2) "[m]ost significant," the jury selection process was "extensive." 2021 WL 1377338 at *14-*16. The court also held that because "our review of the record demonstrates that the evidence was overwhelming… we conclude that the jury's verdict [finding the petitioner guilty on all counts] does not support a finding of presumptive prejudice." 2021 WL 1377338, n.21. Additionally, the court declined to address the petitioner's contention that the carnival atmosphere of the voir dire proceedings supported a presumption of prejudice.

The court also found that the petitioner did not suffer actual prejudice because the voir dire proceedings "adequately detected and defused juror bias." 2021 WL 1377338 at *17. The court rejected the petitioner's argument that this Court's precedents require consideration of jurors' assertions of their own impartiality to include: (1) the emotional nature of the case and the prejudicial effect of the pretrial publicity; and (2) the difficulty of picking an unbiased jury.

REASONS FOR GRANTING THE PETITION

I. The refusal of the Connecticut Supreme Court to consider the guilty verdict and carnival atmosphere of the voir dire as factors favoring a presumption of prejudice cannot be reconciled with this Court's precedents, including *Skilling*, and reflects confusion among the lower courts; furthermore, the court's consideration of the jury selection process in its presumption-of-prejudice analysis warrants review by this Court.

In *Skilling*, this Court looked at four factors when deciding whether the defendant was entitled to a presumption of prejudice. First, and "**of prime**

significance, Skilling's jury acquitted him of nine insider-trading counts." *Id.* at 383-384 (emphasis added). Second, the news stories about Skilling "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight… No evidence of the smoking-gun variety invited prejudgment of his culpability." *Id.* at 382-383; 384-386. Third, Skilling was tried in Houston and "Houston… is the fourth most populous city in the Nation," with a population of "more than 4.5 million individuals eligible for jury duty…." *Id.* at 382. Fourth, Skilling was tried four years after Enron's bankruptcy, and "the decibel level of media attention diminished somewhat" in the intervening years. *Id.* at 383.[15]

In the petitioner's case, the Connecticut Supreme Court purported to apply the four *Skilling* factors. 2021 WL 1377338 at *14-*17. The court found that both the prejudicial nature of the media coverage and its decibel level at the time of trial favored a presumption of prejudice. *Id.* at *15. The court ruled, however, that the petitioner was not entitled to the presumption because: (1) the trial venue (the New Haven Judicial District) had a total population of 846,000; and (2), "most significant," Connecticut's Constitution mandates individual voir dire, which gave "the parties and the court a comprehensive opportunity to assess each prospective juror's familiarity with the case and ability to render an impartial verdict." *Id.* at *16.

The jury verdict. The court held that the jury verdict did not support a finding of presumptive prejudice, ruling:

[15] In rejecting the petitioner's argument that he was entitled to the presumption because of the "sheer number of victims," the Court stated that the jury questionnaire and follow-up voir dire were "well suited to" the factual determination of "prospective jurors' connections to Enron." *Id.* at 385.

> In the present case, the jury found the defendant guilty on all counts, rather than having returned a split verdict, the latter of which has been deemed indicative of impartiality weighing against the presumption of prejudice.… Nonetheless, our review of the record demonstrates that the evidence was overwhelming. Indeed, the defendant conceded the vast majority of the factual issues in the guilt phase—in particular, his participation in the home invasion—choosing to challenge only whether he had sexually assaulted M anally, rather than orally as he had confessed, and whether he had the requisite intent to kill.[16] Accordingly, we conclude that the jury's verdict does not support a finding of presumptive prejudice. See *State v. Townsend*, 211 Conn. 215, 228–29, 558 A.2d 669 (1989) (noting that publicity about plea negotiations and defendant's offer to plead guilty to murder in exchange for five year sentence was "not as inherently prejudicial as in a case in which a defendant denies any involvement in a crime, but nonetheless has considered pleading guilty in exchange for a reduced sentence," because defendant did not "[dispute] the events leading up to the victim's death" but, instead, appeared to challenge whether he had "the requisite intent for murder"); see also *Luong v. State*, [199 So. 3d 139, 148 (Ala. 2014)] (Given "[the defendant's] admission that he threw each of his children off the bridge, the fact that [the defendant] was not acquitted of any of the charged offenses does not either support or rebut a presumption of jury bias or impartiality. The evidence in [the] case simply did not create any inference from which the jury could conclude that he killed some, but not all, of his children."); *State v. Gribble, supra*, 165 N.H. at 23, 66 A.3d 1194 (defendant's admission to participation in crimes and plea of not guilty by reason of insanity reduced prejudice from media reporting on coconspirator's trial that "described the defendant's involvement in the crime" because he "admitted as much when he pleaded not guilty by reason of insanity").
>
> (2021 WL 1377338, n.21 (citations omitted)).

See also United States v. Tsarnaev, 968 F.3d 24, 120 (1st Cir. 2020) (Torruella, C.J., concurring in part, joining in part, concurring in judgment)) ("the *Skilling* Court looked to the jury verdict, finding that the jury's not-guilty findings on nine of the twenty-eight counts in the case `yielded no overwhelming victory for the government.' 561 U.S. at 375, 383, 130 S.Ct. 2896. Here, because Tsarnaev's counsel admitted Tsarnaev's guilt during opening and closing statements, the jury verdict finding Tsarnaev guilty on all thirty counts neither supports nor refutes a presumption of impartiality.") (*citing*

Luong v. State, *supra), cert. granted*, 141 S.Ct. 1683 (2021); *People v. Avila*, 173 Cal.Rptr.3d 718, 732, 59 Cal.4th 496, 512–13, 327 P.3d 821, 834 (2014) ("Defendant also notes that the jury convicted him of all charges and found true both of the charged special circumstances. We and the United States Supreme Court have sometimes cited a split verdict, with some portions favoring the defendant, as further indicating the jury was fair and impartial.... Once the jury found that defendant was the perpetrator—a finding the evidence strongly supports—conviction on all counts and a true finding of both special circumstances was virtually inevitable. The verdict does not suggest bias.") (citations omitted); *State v. Thurber*, 308 Kan. 140, 210, 420 P.3d 389, 439–40 (2018) ("the jury's verdict … was not known when the court ruled. And this court has repeatedly held this factor `carries no weight' because the verdict was not known to the district court when the venue change motion was heard.... But the *Skilling* Court suggested this was a factor for an appellate court to consider rather than the district court. 561 U.S. at 383-84, 130 S.Ct. 2896. The jury's verdict in Thurber's case does not undermine his presumed prejudice claim, but it also does not weigh in favor of presumed prejudice.").

This disregard of jury verdicts in presumption-of-prejudice analyses cannot be reconciled with *Skilling*. There, this Court ruled that pretrial publicity did not raise a presumption of prejudice because "[i]mportant differences separate Skilling's prosecution from those in which we have presumed juror prejudice," including *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v.*

---

[16] The petitioner also disputed that he was guilty of the arson charge.

Maxwell, 384 U.S. 333 (1966). 561 U.S. at 381-382. The Court explained that "of prime significance," was that "Skilling's jury acquitted him of nine insider-trading counts. Similarly, earlier instituted Enron-related prosecutions yielded no overwhelming victory for the Government[17]…. It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption." *Id.* at 383-384. Under *Skilling*, the jury verdict is "of prime significance" when determining whether a defendant is entitled to a presumption of prejudice.

There are, moreover, no principled grounds for treating a split verdict as weighing against a presumption of prejudice but failing to treat a verdict finding the defendant guilty on all counts as supporting the presumption. This is particularly true where, as here, the defendant had powerful arguments that he was not guilty of some of the most serious charges, including intentional murder and arson.[18] The jury's unanimous rejection of all of those arguments supports a presumption of prejudice. This Court should grant this petition and so hold.

The jury selection. The state court considered "Connecticut's attorney led, individual voir dire process" to be the "[m]ost significant" factor in its presumption-of-

---

[17] Although Hayes was acquitted on the arson count, that does not weigh against finding a presumptive prejudice for two reasons. First, as explained *supra*, Dr. Penrod's surveys found far greater prejudice in the petitioner's case than in his Hayes' case. Tr. 2/23/11 at 34-35. Second, Hayes was acquitted of arson and the petitioner was found guilty of arson even though the evidence against Hayes was far stronger. *See* 2021 WL 1377338 at *3 -*4. There is a strong possibility that Hayes' widely publicized arson acquittal prejudiced the petitioner's contention that he was not guilty of the arson, only Hayes was.

[18] Again, as explained *supra*, the petitioner pointed at trial to evidence strongly suggesting that he was not guilty of the capital felony murder charges and the arson charge, including: (1) he consistently denied in his otherwise highly incriminating police statement that he intended to kill the victims or participated in killing them, or that he poured any gasoline in the house; (2) Hayes took J to the bank; (3) Hayes raped and strangled J; and, (4) Hayes purchased the gasoline, poured it throughout the house and lit the match that set the house on fire, killing H and M.

prejudice analysis, noting that "that process far exceeded the more truncated process deemed constitutionally adequate in *Skilling*." 2021 WL 1377338 at *16 (citing 561 U.S. at 387–89). This consideration is inconsistent with this Court's precedents. This Court does not appear to have ever examined the jury selection process when determining whether a presumption of prejudice is warranted. In *Skilling*, this Court considered the adequacy of the voir dire process in its actual-prejudice analysis, not its presumption-of-prejudice analysis. *See* 561 U.S. at 387-389. Indeed, in holding that a state's provision of attorney-led, individual voir dire essentially precludes a finding of presumed prejudice, the state court in effect adopted the reasoning of Justice Alito's concurring opinion in *Skilling*, which states that the sole question in any change-of-venue analysis is whether "a biased juror is actually seated at trial," and that prejudicial pretrial publicity is relevant only to the extent that it impacts the answer to that question. 561 U.S. at 424 (Alito, J., concurring in part and concurring in the judgment). Notably, no other member of the Court joined him.

Other precedents of this Court also instruct that voir dire proceedings are properly considered when determining actual prejudice and are not germane in the presumption-of-prejudice analysis. *See Rideau*, 373 U.S. at 727 (finding presumption of prejudice "without pausing to examine a particularized transcript of the voir dire"); *Estes v. Texas, supra;* and *Sheppard v. Maxwell, supra; Murphy v. Florida.* 421 U.S. at 782 (indicia of impartiality among seated jurors "might be disregarded in a case where the community or courtroom is sufficiently inflammatory…."). *See also Jordan v.*

Lippman, 763 F.2d 1265, 1276, n.11 (11th Cir.,1985) (in *Rideau, Sheppard* and *Estes*, this Court "presumed prejudice without an inquiry into the actual prejudice of jurors as evidenced by the voir dire examination."). These precedents recognize that when pretrial publicity has inflamed an entire community no amount of questioning of jurors will uncover their biases because of unconscious conformity prejudice[19] and because they are unable to recognize their own biases. *See, e.g., Murphy v. Florida*, 421 U.S. 794, 802-803 (1975) ("the juror's assurances that he is equal to th[e] task cannot be dispositive of the accused's rights .... [I]t is … more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it."); *Irvin v. Dowd*, 366 U.S. at 728 ("[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man... No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father...."); *Groppi v. Wisconsin*, 400 U.S. 505, 510 (1971) ("'any judge who has sat with juries knows that in

[19] The Connecticut Supreme Court acknowledged the "major problem" that inflammatory pretrial publicity can set an entire community opinion against a defendant, although the court appeared to posit that attorney-led, individual voir dire will necessarily solve it. *See, e.g.,* 2021 WL 1377338, *8 n.23:

> Penrod explained that the intersection of those who believed that they could be fair and impartial, yet who had also prejudged the defendant's guilt, raised concerns of "conformity prejudice," in which jurors "worry about how they will be perceived in the broader community if they come back with a verdict that's at odds with community expectations about things." Penrod described conformity prejudice as a concept that is rooted in social norms about jury service as a civic responsibility, and as indicating that pretrial publicity has an "endur[ing]" effect that lasts through the presentation of trial evidence and into deliberations.… Penrod believed that conformity prejudice was a "reasonable concern" in this case because there was "so much knowledge about the case" and a "clear sentiment toward guilt," with "part of that knowledge ... about the nature of the case and the perception of it being a gruesome case."…

spite of forms they are extremely likely to be impregnated by the environing atmosphere"') (*quoting Frank v. Mangum*, 237 U.S. 309, 349,(1915) (Holmes, J., dissenting)).[20]

This Court should grant this petition and reenforce its previous holdings that voir dire proceedings are not relevant to the determination of whether a defendant is entitled to a presumption of prejudice.

The atmosphere during the voir dire. On direct appeal, the petitioner argued that the carnival atmosphere of the voir dire supported a presumption of prejudice even though it did not involve the media's physical intrusion into the courtroom. The state court rejected this argument. The court read the holdings in *Estes v. Texas*, 381 U.S. 532, and *Sheppard v. Maxwell*, 384 U.S. 333, to be limited to cases where the media "physically overran the courtroom itself, creating [b]edlam and

---

[20] *See also* 2021 WL 1377338, *8 n.23:

> … Penrod also testified that studies indicate that people have difficulty recognizing their own biases, including those arising from the effects of pretrial publicity, and are attuned to give "socially desirable response[s]" to questions on this topic. Penrod observed that the very effect of the juror oath administered by an authority figure, namely, the trial judge—even during voir dire—might be to reinforce, rather than to alleviate, the effect of conformity prejudice.

And see *Delaney v. United States*, 199 F.2d 107, 112 (1st Cir. 1952) ("one cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity."); Tr. 2/23/11 (morning) at 82 (testimony of Dr. Penrod) (empirical research demonstrates that a very high proportion of those studied say they can be fair and impartial jurors while also saying that the defendant is guilty); id. at 85-86 (jurors give the socially desirable responses in open court; people in general do not want to say that they cannot be a fair and impartial).

A large body of research demonstrates that people are often ignorant of the cognitive processes by which they form their judgments and decisions, and that people are often unable to recognize their own biases. *See* Richard E. Nisbett & Timothy D. Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977) (providing a review of this research); David Yokum, *et al.*, *The Inability to Self-Diagnose Bias*, 96 Denver L. Rev. 869 (2019).

a carnival atmosphere around the trial." 2021 WL 1377338 at *12 (citations and internal quotation marks omitted).

The court's reading of *Estes* and *Sheppard* was unduly cramped. In *Skilling*, this Court did not directly address whether a presumption of prejudice is supported by disruptions to the solemnity of the voir dire enkindled by pretrial publicity but not by physical intrusion into the courtroom by the media. As Justice Sotomayor pointed out in her opinion, "there is no suggestion that the courtroom in this case became, as in *Estes* and *Sheppard*, a `carnival' in which the `calmness and solemnity' of the proceedings was compromised." 561 U.S. at 446 (Sotomayor, J., concurring and dissenting) (*quoting Sheppard*, 384 U.S. at 358, 350).

To be sure, the majority in *Skilling* did remark in dictum in a footnote that "Skilling's reliance on *Estes* and *Sheppard* is particularly misplaced; those cases involved media interference with courtroom proceedings **during** trial." 561 U.S. at 381-382 n.14 (emphasis in original). This *dictum* was apparently the basis for the state court's reading of *Sheppard* and *Estes*. This Court should grant the petition and provide the lower courts with guidance as to whether the holdings of these precedents are limited to physical intrusions into the courtroom by the media.

In the petitioner's view, *Sheppard* and *Estes* are best understood as applying to disruptions to the solemnity and calmness of judicial proceedings produced by the media either through inflammatory pretrial publicity or through physical intrusion into the courtroom. Nothing in either case suggests that their holdings turn on physical intrusion; rather, the decisions discuss at length the inflammatory pretrial publicity in the cases, the disruptions to the calmness and solemnity of the proceedings caused by

that publicity, and the prejudicial effects on the community at large. *See, e.g., Estes*, 381 U.S. at 536 (plurality) ("The videotapes of these [pretrial] hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. Pretrial [publicity] can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence. All of this two-day affair was highly publicized and could only have impressed those present, and also the community at large, with the notorious character of the petitioner as well as the proceeding."); *Sheppard*, 384 U.S at 333-342; 350-51 (pretrial publicity "must not be allowed to divert the trial from the very purpose of a court system … to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.… [I]t is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion.") (citations and internal quotation marks omitted); *id.* at 353-56 ("we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that 'judicial serenity and calm to which (he) was entitled.'") (citation omitted); *id.* at 363 ("the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community….").

As this Court explained in *Murphy v. Florida*, "in *Rideau, Estes*, and *Sheppard* the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of the mob." 421 U.S. at 798-

99. Other court decisions are in accord.[21]

Any distinction between courtroom disruption caused by media intrusion and courtroom disruption caused by inflammatory pretrial publicity is one without a difference. The logical focus is and should be on **whether**, not **how**, the media disrupted the calmness and solemnity of the proceedings. It did so here, and that disruption must be weighed in favor of a presumption of prejudice.

This Court should grant this petition and hold that the petitioner was entitled to a presumption of prejudice. Alternatively, this Court should grant this petition and remand this case to the Connecticut Supreme Court with instructions to reconsider its ruling that petitioner was not entitled to a presumption of prejudice using the correct analytical framework.

II. The refusal of the Connecticut Supreme Court when evaluating the jurors' protestations of impartiality to consider the emotional nature of the case, the prejudicial effect of the pretrial publicity and the difficulty of picking an unbiased jury cannot be reconciled with this Court's precedents, including *Skilling*, and reflects confusion among the lower courts.

A. The state court failed to apply this Court's case law holding that courts must consider the emotional nature of the case and the prejudicial effect of the media coverage when evaluating jurors' assurances of impartiality.

In deferring in its actual-prejudice analysis to the trial court's acceptance of the

---

[21] *See Dobbert v. Florida*, 432 U.S. 282, 303 (1977) (issue is whether trial atmosphere was "utterly corrupted by press coverage."); *United States v. Blom*, 242 F.3d 799, 804 (8th Cir.) ("Although the media coverage was extensive, it was not so inflammatory or accusatory as to presumptively create 'a trial atmosphere that had been utterly corrupted by press coverage.' *Murphy*, 421 U.S. at 798."), *cert. denied*, 534 U.S. 880 (2001); *State v. Nelson*, 173 N.J. 417, 803 A.2d 1, 35–36 (2002) ("Presumptively prejudicial publicity means a torrent of publicity that creates a carnival-like setting.") (internal quotation marks and citations omitted).

jurors' assurances of their impartiality, the Connecticut Supreme Court failed to consider binding precedent from this Court holding that assessments of jurors' assurances of impartiality must include consideration of the emotional nature of the case and the prejudicial effect of the media coverage. *See* 2021 WL 1377338 at *13, *17-*28 & n.17.[22] The court cited *Skilling*, a white-collar fraud case, repeatedly and at length for the proposition that trial courts have "wide discretion" in evaluating jurors' impartiality. 2021 WL 1377338 at *13 (*Skilling* "[e]mphasiz[ed] the customary deference given by appellate courts to trial courts' assessments of juror impartiality"); *18 ("`[r]eviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality.,…'") (*quoting* 561 U.S. at 386-87). However, the court failed to recognize a key portion of the *Skilling* decision. In it, the majority responded to the petitioner's and Justice Sotomayor's reliance on *Irvin v. Dowd*, 366 U.S. 717, for the proposition that a juror's assurance of their impartiality is not decisive when "the build-up of prejudice [in the community] is clear and convincing."

[22] The court concluded that "the defendant suffered no actual prejudice from the extensive pretrial publicity about this case, as both the jury and the voir dire process by which it was selected compared very favorably to that which the United States Supreme Court deemed constitutionally acceptable in *Skilling*…." 2021 WL 1377338 at *26. The court was correct that the jury selection procedures in this case were more extensive than those in *Skilling*. But the court's conclusion that the petitioner's jury "compared very favorably" to the jury in *Skilling* is difficult to understand. Again, in petitioner's case, six of the 18 seated jurors had preconceived notions that the defendant was guilty, virtually all had substantial knowledge of the case, and many had been told by spouses, parents, other family members, other prospective jurors, friends, co-workers and/or others in the New Haven community that the defendant was guilty and/or should be sentenced to death. In contrast, in *Skilling*, "[w]hen asked whether they `ha[d] an opinion about … Jeffrey Skilling,' none of the seated jurors and alternates checked the `yes' box." 561 U.S. at 391-391, 389, n. 24 ("Significantly, … the seated jurors showed little knowledge of or interest in, and were personally unaffected by, Enron's downfall."); *id.* at 390-391 ("As for pretrial publicity, 14 jurors and alternates specifically stated that they had paid scant attention to Enron-related news… The remaining two jurors indicated that nothing in the news influenced their opinions about Skilling."). *See also Mu'Min v. Virginia,* 500 U.S. 415, 421 (1991) (no petit juror "had indicated that he had formed an opinion about the case or would be biased in any way.").

Id. at 725, 728. The majority in *Skilling* explained that because "[t]he facts of *Irvin* are worlds apart from those presented here, … the District Court had far less reason than did the trial court in *Irvin* to discredit jurors' promises of fairness." 561 U.S. at 392-394.

The relevant "facts of *Irvin*" cited by the majority pertained to the emotional nature of the case and the prejudicial effect of the media coverage. *Id.* ("Leslie Irvin stood accused of a brutal murder and robbery spree…"; "in the months before Irvin's trial, 'a barrage of publicity was unleashed against him, including reports of his confessions to the slayings and the robberies"; media reports also included details of his background, including reference to his prior convictions, accusations that he was a parole violator, that he was placed at the scene, and that he had offered to plead guilty) (*quoting and citing* 366 U.S. at 719, 725-726). The Court explained *Irvin's* holding as follows: "Although these jurors declared they could be impartial, we held that, '[w]ith his life at stake, it is not requiring too much that [Irvin] be tried in an atmosphere undisturbed by so huge a wave of public passion ….' *Id.*, at 728, 81 S.Ct. 1639." 561 U.S. at 393-294.[23] *See also id.* at 425 (Alito, J., concurring in part and concurring in

[23] *See also* Tr. 2/23/11 at 95-96 (Penrod's testimony) (deleterious effects of prejudicial publicity are "larger in cases involving murder and sexual assault.... "); Jordan Gross, *If Skilling Can't Get A Change Of Venue, Who Can? Salvaging Common Law Implied Bias Principles from the Wreckage of the Constitutional Pretrial Publicity Standard,* 85 Temp. L. Rev. 575, 601, 606-607 & notes 225, 253-258 (2013) ("pretrial publicity that has emotional (rather than factual) content can have a significant impact on jurors' willingness to convict a defendant. Despite trial courts' widespread willingness to accept a juror's statement that he or she will be fair notwithstanding exposure to extraneous prejudicial information, such self-assessments are highly unreliable. And despite trial courts' confidence that juror bias can be detected and eliminated through searching and careful voir dire, it cannot.…") (*citing, inter alia*, Geoffrey P. Kramer et. al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUMAN BEHAV. 409, 411–14, 430 435 (1990) (explaining how jurors exposed to "emotional pretrial publicity (i.e., 'graphic or lurid depiction[s]' of a victim's injuries) as opposed to strictly 'factual' publicity will be more likely to convict and be more passionate about their stance.") (citations omitted)).

the judgment) ("evidence of pretrial media attention and widespread community hostility may play a role in the bias inquiry" of seated jurors). *And see Hayes v. Ayers*, 632 F.3d 500, 511 (9th Cir.2011) ("We may give 'little weight' to a prospective juror's assurances of impartiality 'where the general atmosphere in the community or courtroom is sufficiently inflammatory.'") (*quoting Irvin*, 366 U.S. at 728, and *Murphy,* 421 U.S. at 802); *Patton v. Yount*, 467 U.S. 1025, 1035-36 (1984) (inquiry into juror bias asks not only whether the juror swore "he could set aside any opinion he might hold and decide the case on the evidence," but also: "should the juror's protestation of impartiality have been believed?"; "There was fair, even abundant, support for the trial court's findings that between the two trials of this case there had been `practically no publicity given to this matter through the news media,' and that there had not been 'any great effect created by any publicity.'").

Skilling distinguished but did not overrule *Irvin*, and each of the *Irvin* facts referenced by *Skilling* also existed in the petitioner's case, including: a brutal crime, a wave of public passion, a barrage of publicity, and numerous reports of the defendant's confession, his prior convictions, his parole status, his arrest at the scene, and his offer to plead guilty. Nonetheless, and contrary to *Skilling* and *Irvin*, the state court failed to take these facts into account when reviewing the trial court's decision to credit the jurors' assessments of their own fairness.

This Court should grant this petition and hold that, given the emotional nature of the case and the prejudicial media coverage, the trial court erred in crediting the jurors' protestations of impartiality, and that the appellant suffered actual prejudice. Alternatively, this Court should grant this petition and remand this case to the state

court with instructions to consider the emotional nature of the case and the prejudicial media coverage when reviewing the trial court's decision to credit the jurors' assurances of impartiality.

B. The state court failed to apply this Court's case law holding that, at least in emotionally charged cases, courts must consider the difficulty of picking unbiased jurors when evaluating jurors' assurances of their own fairness.

As explained *supra*, jury selection in this case consumed three months. The trial court immediately excused for cause over two hundred prospective jurors because they admitted they could not be fair. In addition, the defense exercised the vast majority of its 40 peremptory challenges on venire members because of their perceived bias, including 12 jurors which it unsuccessfully challenged for cause. Even the state apparently used two of its 40 peremptory challenges on jurors because of their bias against the defendant. Six of the 18 seated jurors had preconceived notions that the defendant was guilty, virtually all had substantial knowledge of the case, and many had been told by spouses, parents, other family members, other prospective jurors, friends, co-workers and/or others in the New Haven community that the defendant was guilty and/or should be sentenced to death.

In deciding whether the trial court properly credited the seated jurors' assurances of their own impartiality, the Connecticut Supreme Court refused to consider the difficulty of selecting unbiased jurors. *See* 2021 WL 1377338 *18 (citations and internal quotation marks omitted):

> In assessing for actual prejudice, we are cognizant that a lengthy voir dire process is frequently necessary to seat a sufficient number of impartial jurors and that a lengthy duration is not, by itself, indicative of pervasive prejudice permeating through the jury pool, insofar as a jury selection process of several weeks in length

> is not unusual in either contemporary or historical terms. [M]ajor cases have been known to require six weeks or more before the jury is seated.… [I]t defies logic to count the efforts the … [c]ourt has taken to carefully explore, and eliminate, any prejudice as showing the existence of the same.… This is particularly so in death penalty cases, which add significant lines of questioning to the juror qualification process.

Other courts have done the same. *See, e.g. In re Tsarnaev,* 780 F.3d 14, 25-26 (1st Cir. 2015) ("it defies logic to count the efforts the district court has taken to carefully explore, and eliminate, any prejudice as **showing** the existence of the same.") (emphasis in original); *Holland v. Warren*, 2011 WL 7144990, at *10, n.1 (E.D.Mich.,2011) (rejecting the petitioner's contention "that the bias of the jury is demonstrated by the fact that a large percentage of the venire members indicated on the questionnaires that they thought petitioner was guilty or responsible for the victim's death.") (citation omitted); *Carrillo v. Ryan*, 2017 WL 2559972, at *16 (D.Ariz., 2017) (same); *Vieira v. Chappell*, 2015 WL 641433, at *130 (E.D.Cal.), *appeal filed* (9th Cir., March 9, 2015) (same).

Those courts have apparently construed a footnote in *Skilling* to mean that the difficulty of picking unbiased jurors is not a proper consideration when assessing jurors' assurances of impartiality. *See* 561 U.S. at 391, n.24 ("Statements by nonjurors do not themselves call into question the adequacy of the jury-selection process; elimination of these venire members is indeed one indicator that the process fulfilled its function."). *But see* 561 U.S. at 457, n. 20 (Sottomayor, J., concurring in part and dissenting in part). However, the *Skilling* footnote is addressed only to the adequacy of the jury-selection process, not to the question of whether the difficulty of picking an unbiased jury is a necessary consideration when assessing jurors' assurances of

impartiality. At the very least, this Court should grant this petition to clarify the correct construction of its footnote.

Moreover, the majority in *Skilling* was careful to differentiate the white-collar case before it from the emotionally charged *Irvin* case, where the Court had considered the difficulty of selecting an unbiased jury when assessing the seated jurors' assurances of their impartiality. As the majority stated:

> Reviewing Irvin's fair-trial claim, this Court noted that "the pattern of deep and bitter prejudice" in the community "was clearly reflected in the sum total of the *voir dire*": "370 prospective jurors or almost 90% of those examined on the point ... entertained some opinion as to guilt," and "[8] out of the 12 [jurors] thought [Irvin] was guilty." [*Irvin.*, 366 U.S.] at 727, 81 S.Ct. 1639 (internal quotation marks omitted). Although these jurors declared they could be impartial, we held that, "[w]ith his life at stake, it is not requiring too much that [Irvin] be tried … by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." *Id.*, at 728, 81 S.Ct. 1639. (*Skilling*, 561 U.S. at 393-294.)

Again, *Skilling* did not overrule *Irvin*, and the opinion should be read to hold that, at least in emotionally charged criminal cases such as this one that engender a "pattern of deep and bitter prejudice in the community," courts must consider the difficulty of selecting an unbiased jury when assessing jurors' assurances of their own ability to be fair.

Other precedents from this Court support this reading of *Skilling*. *See, e.g., Murphy v. Florida*, 421 U.S. 794, 802-803 (1975) ("the juror's assurances that he is equal to th[e] task cannot be dispositive of the accused's rights .... The length to which the trial court must go in order to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality."); *Irvin v. Dowd*, 366 U.S. at 728 ("Where so many, so many times, admitted prejudice, such a statement

of impartiality can be given little weight")**.**

This Court should grant this petition, affirm these precedents, and hold that, given the difficulty of picking unbiased jurors in this emotionally charged case, the trial court erred in crediting the jurors' protestations of impartiality, and that the petitioner suffered actual prejudice. Alternatively, this Court should grant the petition and remand this case to the Connecticut Supreme Court with instructions to consider in its review of the trial court's decision to credit the jurors' assessments of their own fairness the difficulty of picking an unbiased jury.

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated above.

Respectfully submitted,

BY: /s/ John Holdridge

John Holdridge*
153 Boulevard Hgts
Athens, GA 30601
Tel: (917) 496-4267
Fax: (706) 850-0684
holdridgejohn@gmail.com

Counsel for petitioner

* Counsel of record