No. _____

In The

Supreme Court of the United States

LEMARICUS D. DAVIDSON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

This is a death penalty post-conviction case. In the proceedings below, Petitioner asserted that his trial counsel rendered ineffective assistance of counsel based on their failure to request an out-of-county venire from which to empanel the jury. It is undisputed that such a request would have been granted: Petitioner's three State-charged co-defendants all received out-of-county venires from which to empanel their respective juries, and none of these co-defendants received the death penalty, although two of the three were convicted of first degree murder with death-eligible aggravating circumstances. In fact, the trial judge, on multiple occasions, implored Petitioner's counsel to seek an out-of-county jury given the extensive prejudicial pretrial coverage that the case received leading up to Petitioner's trial.

At a post-conviction evidentiary hearing, Petitioner presented evidence that the local newspaper of record, the Knoxville News Sentinel, published 322 stories, including 100 front page stories, about the facts and circumstances of the case, the culpability of the defendants, the legal proceedings of the case, and the view that the defendants all deserved the death penalty. Local television stations similarly broadcast over three thousand news stories in the under-three-year period between the crime and the trial, covering the same information. Online commentaries about the case repeated racist invective, accused the national media of a racial double standard (the victims were white, and defendants are Black), and similarly forwarded the viewpoint that the defendants should receive the death penalty. White supremacists, including the Ku Klux Klan, organized rallies protesting Black-on-white crime in downtown Knoxville, in front of the building where Petitioner would later be tried. Local polls conducted showed that over 90% of Knox County residents thought the defendants deserved the death penalty.

When Petitioner was tried, all his jurors had been exposed to pretrial publicity concerning the case. Over half of the seated jurors had preformed opinions about Petitioner's and/or his co-defendants guilt. Multiple jurors had watched trial proceedings and testimony from his co-defendant's trial, which was aired in full on television to the local community. One juror had previously written to television commentator Nancy Grace to try to get CNN to cover the crime on national news.

The trial attorneys for Petitioner received multiple death threats during the pendency of the case, resulting in an increased law enforcement presence throughout the trial. Audience members, including family members of the victims, disrupted trial proceedings with outbursts, harassed the attorneys representing Petitioner, and violated court admonitions concerning buttons containing life-in-being photographs

of the victims. A prosecutor fainted in front of the jury during the presentation of autopsy photographs and was treated by the State's expert medical examiner before the jury was sent out of the courtroom. The members of the media, equipped with cameras, found seating wherever it was to be found. The courtroom was full every day of the trial with members of the public at times turned away due to limits in seating capacity.[1] The trial judge, charged with assessing the credibility of jurors' assertions of impartiality during voir dire, was procuring and ingesting illegal opioids during Mr. Davidson's trial.

The post-conviction court, and later the Tennessee Court of Criminal Appeals, found that Petitioner's trial counsel performed deficiently. However, both courts refused to presume the prejudice prong of the ineffective assistance of counsel analysis under this Court's precedents of *Rideau v. Louisiana*, *Estes v. Texas*, *Sheppard v. Maxwell*, and *Skilling v. United States*. Petitioner brings the following question to this Court: Should prejudice in an ineffective assistance of counsel case be presumed where the deficient performance of counsel resulted in a structural error compromising the fundamental fairness of the preceding, especially where proof of actual prejudice is virtually impossible?

[1] The post-conviction proceedings and related collateral litigation were heard in 2019, twelve years after the crime had occurred. Despite this lapse in time, the Knoxville News Sentinel published articles on the front page of the newspaper concerning these proceedings.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

RELATED PROCEEDINGS

LeMaricus Davidson v. State of Tennessee, E2019-00541–SC–R11–PD, (Tenn. 2021)(the Tennessee Supreme Court denied Petitioner's Rule 11 application to appeal the post-conviction rulings of the Tennessee Court of Criminal Appeals;

LeMaricus Davidson v. State of Tennessee, E2019-00541–CCA–R3–PD, (Tenn. Crim. App. 2021)(The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court);

LeMaricus Davidson v. State of Tennessee, Knox County Criminal Court, No. 111962 (2019)(The post-conviction court denied relief);

State of Tennessee v. LeMaricus Davidson, Knox County Criminal Court, No. 86216B (2009)(Mr. Davidson was convicted and sentenced to death);

State of Tennessee v. LeMaricus Davidson, E2013–00394–SC–DDT–DD, (Tenn. 2016)(The Tennessee Supreme Court affirms Mr. Davidson's convictions and sentences on direct appeal).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner LeMaricus Davidson respectfully seeks a writ of certiorari to review the judgment of the Tennessee Court of Criminal Appeals.

OPINIONS BELOW

The opinion from the Tennessee Court of Criminal Appeals in this post-conviction matter is attached to this Petition as Appendix A.

STATEMENT OF JURISDICTION

The Tennessee Court of Criminal Appeals entered its judgment on August 19, 2021. Petitioner filed for discretionary review by the Tennessee Supreme Court, which was denied without hearing on December 8, 2021. This Court has subject matter jurisdiction under 28 U.S.C. § 1257(a) as this case involves the legality of Petitioner's convictions and sentences under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, in relevant part, provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises from the January 2007, murders of Channon Christian and Christopher Newsom in Knoxville, Tennessee. Five individuals, including Mr. Davidson, were charged with the first degree murders of Ms. Christian and Mr. Newsom, and the murders resulted in one federal criminal trial[2], five state prosecutions[3], and two state retrials.[4] Mr. Davidson was the only defendant from any of these legal proceedings sentenced to death.

Mr. Davidson seeks permission to appeal the Tennessee Court of Criminal Appeals' opinion, discretionary appeal denied by the Tennessee Supreme Court, in this capital post-conviction case. In the proceedings below, Mr. Davidson raised a claim of ineffective assistance of counsel relating to his attorneys' decision not to move for an out-of-county jury in the face of overwhelming and prejudicial pretrial publicity surrounding his case. The post-conviction court and the Tennessee Court of Criminal

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[2] Prior to Petitioner's capital trial, co-Defendant Eric Boyd was tried in federal court for aiding Mr. Davidson following the murders. His federal prosecution required proof that Mr. Davidson committed the murders. The jury found him guilty and he was sentenced to prison.

[3] Mr. Davidson, co-defendant Letalvis Cobbins, co-defendant Vanessa Coleman, and co-defendant George Thomas were indicted for the first degree murders of Ms. Christian and Mr. Newsom in 2007. Mr. Davidson, Thomas, and Cobbins were each convicted of first degree murders, and sentencing aggravating circumstances were found for each conviction; however, only Mr. Davidson was sentenced to death. Coleman was acquitted of first degree murder, but was found guilty of lesser included offenses. Over ten years after the crime, co-defendant Eric Boyd was indicted for the first degree murders in state court. He was found guilty and sentenced to life imprisonment.

[4] After the first round of state court convictions, information came to light that the trial judge, Richard Baumgartner, was addicted to and abusing drugs during his tenure as Knox County Criminal Court judge. His drug abuse resulted in retrials for co-defendants Thomas and Coleman. Mr. Davidson and co-defendant Cobbins did not receive retrials because DNA evidence linking them to the offenses did not undermine the successor judge's ability to serve as the thirteenth juror. The retrials resulted in convictions for both Coleman and Thomas. Thomas received a sentence of life imprisonment for the first degree murders. Thomas's sentence was reduced due to his later cooperation with the State in the prosecution of co-defendant Eric Boyd in state court.

Appeals agreed that Mr. Davidson's trial counsel exhibited deficient performance in failing to request an out-of-county venire. However, both lower courts found that Mr. Davidson failed to satisfy the prejudice prong of the ineffective assistance of counsel analysis. *Davidson v. State*, No. E2019–00541–CCA–R3–PD (Tenn. Crim. App. Aug. 19, 2021).

Mr. Davidson argued that prejudice should be presumed under *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Estes v. Texas*, 381 U.S. 532 (1965), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Skilling v. United States*, 561 U.S. 358 (2010). In each of these cases, this Court reviewed whether the pretrial publicity surrounding the case warranted a presumption of juror prejudice despite the jurors' professed impartiality and stated ability to decide the case based on the evidence presented at trial. In *Rideau*, *Sheppard*, and *Estes*, this Court found such a presumption warranted and overturned the defendants' convictions. In *Skilling*, this Court declined to presume prejudice but articulated factors for courts reviewing highly publicized cases to consider in determining whether juror prejudice may be presumed, each of which are present in Petitioner's case. Mr. Davidson requests that this Court grant his Petition for Certiorari to appeal the case to determine whether prejudice may be presumed for Mr. Davidson's counsel's deficient decision to proceed with a local jury due to the structural error that resulted from that decision which compromised the fundamental fairness of his death penalty trial.

FACTUAL STATEMENT

The parties, the trial court, the post-conviction court, and the lower appellate court all agree that this case generated extensive pretrial media coverage. Judge

Baumgartner, the presiding trial judge, said that he had never seen anything like the amount of publicity the murders of Channon Christian and Christopher Newsom generated.[5] Knoxville attorney Stephen Ross Johnson, who represented co-defendant George Thomas at his capital trial, agreed that he's "not seen anything or even heard of anything like it, in my experience."[6] Lead counsel for Mr. Davidson recalled that the media covered "essentially every aspect of the case" and that he had not handled any other case that "generated [that] level of media coverage." *Davidson v. State*, No. E2019–00541–CCA–R3–PD, at 7 (Tenn. Crim. App. Aug. 19, 2021). His co-counsel echoed these sentiments in their testimony. *Id.* at 10—13. The post-conviction record confirms these observations.

During the period January 2007 to October 2009, when Mr. Davidson was tried, the Knoxville News Sentinel published 322 articles on the Christian/Newsom murders and the legal proceedings against Mr. Davidson and his co-defendants.[7] One hundred of those articles appeared on the Knoxville News Sentinel's front page.[8]

Television news reports in the Knoxville media market featured the case 3,111 times from the time of the offense until the end of October 2009.[9] These news reports reached a collective estimated audience of 113,993,812 viewers.[10] From the time of

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[5] PC Exhibit 116: 8/25/09 Knoxville News Sentinel at A9; *see also* PC Exhibit 112: News Data Service Report at ¶¶ 1005 (9/1/09)("The unprecedented media coverage is something Judge Richard Baumgartner has never seen before in Knoxville."), 1007 (9/1/09)(same).
[6] PC Tr. at 120.
[7] PC Tr. at 260; *see* PC T.R. 4, 581-82.
[8] *Id.*
[9] PC Tr. at 253.
[10] PC Exhibit 112: News Data Services Report (tabulating estimated viewership from all Knoxville media market news stories about the case in that time period). The collective audience in these figures do not necessarily reflect the number of individuals who saw these broadcasts, but rather the number of times these broadcasts were viewed within the Knoxville media market. In other words, some individuals could have viewed stories on the issues discussed in this application multiple times.

the offense until March 2008, when the State gave notice of its intention to seek Mr. Davidson's death, the Knoxville television news had covered the case 842 times.[11] On April 16, 2008, the date of the verdict in co-defendant Eric Boyd's federal court trial, where his jury found that he had assisted Mr. Davidson after Mr. Davidson committed the crime, Knoxville's three television stations mentioned the case forty times to an estimated viewership of nearly three million people on that day alone.[12]

In August 2009, the month of co-defendant Letalvis Cobbins's trial and two months before Mr. Davidson's trial, Knoxville television stations broadcast segments about the case 478 times.[13] On the day Cobbins took the stand and incriminated Mr. Davidson for the murders, the three Knoxville television stations featured the testimony fourteen times.[14] These broadcasts reached approximately 408,000 estimated viewers across those fourteen broadcasts on that one day.[15] Across August 25, 26, and 27, 2009, Knoxville's three local affiliates reported on Cobbins's verdict of guilt and his life sentence ninety-eight times.[16] Almost three million estimated viewers saw a Knoxville television segment related to Cobbins's verdict or sentence.[17]

Prior to Mr. Davidson's trial, the Knoxville television news labeled him the ringleader of the men who kidnapped Ms. Christian and Mr. Newsom seventy-six times to an estimated two-and-a-half million viewers.[18] Local news stories aired fifty-

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[11] PC Tr. at 254.
[12] *Id.* at 256.
[13] *Id.* at 257.
[14] *Id.*
[15] *Id.* at 258.
[16] *Id.*
[17] *Id.* at 259.
[18] *Id.* at 270.

three segments featuring arguments, statements, and testimony from the Boyd and Cobbins trials that painted Mr. Davidson as the most culpable party to the crimes.[19] Roughly 2.3 million viewers saw such an incriminating television segment in the Knoxville media market.[20] The local media dubbed the murders of Ms. Christian and Mr. Newsom "torture slayings" and repeatedly used that description throughout their coverage of the case.[21]

Seventy-eight Knoxville television news segments featured Mr. Davidson's co-defendants' statements to police—that again made Mr. Davidson out as the most culpable offender—to a collective estimated audience of three-and-a-half million persons.[22] Sixty-three television news segments reported on Mr. Davidson's prior convictions, incarcerations, or uncharged crimes to an estimated Knoxville viewership of 2.3 million viewers.[23]

The local television news aired fifty-three segments where the victims' parents voiced disappointment that co-defendant Cobbins had not received a death sentence and/or their opinion that Mr. Davidson should receive a death sentence.[24] An estimated audience of 1.3 million persons in the Knoxville media market saw one of these segments where the victims' parents supported a death sentence for the murders of Ms. Christian and Mr. Newsom.[25]

In all, Knoxville television stations aired at least 300 news segments that

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[19] *Id.* at 271.
[20] *Id.*
[21] *See, e.g.*, PC Tr. at 268.
[22] *Id.* at 272.
[23] *Id.* at 272–273.
[24] *Id.* at 274.
[25] *Id.*

portrayed Mr. Davidson as the most responsible party to the murders, included information about his other crimes and incarcerations later held inadmissible at his trial, or offered sentiments that death was the only just punishment for the murders.[26] Over twelve million estimated viewers in the Knoxville media market saw such news segments.[27]

REASONS FOR GRANTING THE PETITION

I. This case falls under the narrow class of cases involving extensive pretrial publicity for which this Court has presumed prejudice when the jury is selected from the venue tainted by the pretrial publicity.

A. A presumption of juror prejudice exists without pausing to examine the voir dire in Mr. Davidson's trial given the nature and extent of the pretrial publicity.

The presumed prejudice doctrine originated in *Rideau v. Louisiana*, 373 U.S. 723 (1963). There, the defendant's taped confession to law enforcement officers was broadcast three times to a respective estimated viewership of 24,000, 53,000, and 20,000. *Id.* at 723. The parish in which the crime was committed, and where the defendant was tried, had 153,000 residents. *Id.* The defendant moved for a change of venue, was denied by the trial court, and appealed following his conviction. *Id.* Three of the sitting jurors admitted to seeing the defendant's taped confession, but all the jurors testified that they could "lay aside any opinion, give the defendant the presumption of innocence as provided by law, base their decision solely upon the evidence, and apply the law as given by the court." *Id.* at 732. The jurors further "testified they could [decide the case impartially] notwithstanding anything they may

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[26] *Id.* at 275–76.

[27] *Id.* at 276.

have heard, seen or read of the case." *Id.*

This Court reversed the defendant's conviction, holding "it was a denial of due process of law to refuse the request for a change of venue, after the people of [the local county] had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later charged." *Id.* at 726. The community's exposure to the defendant's taped confession "in a very real sense was [the defendant's] trial—at which he pleaded guilty to murder." *Id.* at 726. This Court reached its conclusion "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury." *Id.* at 727. This Court further emphasized that Rideau's case involved the death penalty, noting that "[d]ue process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." *Id.* (citing *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

This Court presumed prejudice again in *Estes v. Texas*, 381 U.S. 532 (1965). There, the defendant's pre-trial hearing and trial itself were broadcast to the local community. *Id.* at 535—38. In reviewing the case, this Court held that when a procedure employed by the state involves a probability that prejudice will result, a due process violation occurs irrespective of any actual prejudice showing. *Id.* at 542—43 (rejecting the state's argument that the defendant had shown "no isolatable prejudice"). Because there existed a "reasonable probability that prejudice [would] result," the entire proceeding was "inherently lacking in due process." *Id.* at 543.

This Court revisited the issue again in *Sheppard v. Maxwell*, 384 U.S. 333

(1966), a case involving a highly publicized murder. The crime was followed by an "editorial artillery" in which a front-page article charged that someone was "getting away with murder." *Id.* at 340. Newspaper articles "emphasized evidence that tended to incriminate [the defendant] and pointed out discrepancies in his statements to authorities." *Id.*

In analyzing whether Sheppard was entitled to a presumption of prejudice due to the publicity surrounding the case, this Court noted "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Id.* at 351. Rather, a jury's verdict must "be based on the evidence received in open court, not from outside sources." *Id.* This Court further held that an actual prejudice showing, under those circumstances, "need not be undertaken"; rather, it was sufficient that a "reasonable probability that prejudice [would] result." *Id.*

Following the trilogy of *Rideau*, *Estes*, and *Sheppard*, this Court has continued to note that in extreme cases of pretrial publicity, juror prejudice may be presumed without a showing of actual juror bias. *Patton v. Young*, 467 U.S. 1025, 1031 (1984)(noting "adverse pretrial publicity can create such a presumption of prejudice in the community that the jurors' claims that they can be impartial should not be believed"); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)(noting that when a petit jury has been... exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained"); *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991)(noting that when "presumption of prejudice in a

community" arises from the "wave of public passion" surrounding the events of trial, "the jurors' claims that they can be impartial should not be believed"); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)(noting that community exposure to extensive pretrial publicity can require "reversal of the conviction because the effect of the violation cannot be ascertained"). While a presumption of prejudice "attends only the extreme case," this Court has been clear: when a case reaches such a level, the prejudice is presumed regardless of the jurors' professed impartiality or stated ability to set aside what they have heard prior to hearing the case. *Skilling v. United States*, 561 U.S. 358 (2010).

This Court reaffirmed these foundational presumed prejudice cases in *Skilling*. There, Jeffrey Skilling was denied a change of venue in his criminal trials following the collapse of Enron. *Id.* In reviewing *Rideau*, *Estes*, and *Sheppard*, this Court articulated four factors that should be considered in high profile cases to determine whether presumed prejudice arises from a failure to change venue: (1) "the size and the characteristics of the community in which the crime occurred"; (2) whether the pretrial coverage contained "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; (3) the time between the commission of the crime and trial, and whether the "decibel level of the media attention diminished" during that time; and (4) whether the jury's verdict, or the verdicts of any co-defendants, belies jury bias. *Id.* at 382–83. While this Court declined to presume prejudice under these factors in *Skilling*, the factors articulated in its analysis are instructive for this case. Each of these factors, discussed below,

support presuming prejudice from Mr. Davidson's counsel's deficient performance.

1. The size and characteristics of Knox County, Tennessee support a finding of presumed prejudice in Mr. Davidson's case.

In concluding that Skilling was not entitled to a presumption of prejudice, this Court compared the size of the communities in which Skilling's and Rideau's trials occurred. Noting that Rideau's community had 150,000 residents and Skilling's community had 4.5 million residents and was the fourth largest city in the United States, this Court found that a presumption of prejudice would be hard to sustain given "this large, diverse pool of potential jurors." *Skilling*, 561 U.S. at 382. This Court also compared the Houston community to Washington D.C., the community evaluated in *Mu'Min v. Virginia*, 500 U.S. 415 (1991), where there were over three million residents and in which "hundreds of murders are committed each year." *Id.* In *Mu'Min*, both the size of the community and the number of similar murders committed there mitigated the potential for presumed prejudice. *Skilling*, 561 U.S. at 382 (reviewing *Mu'Mun v. Virginia*, 500 U.S. 415 (1991).

Knox County, Tennessee, where Mr. Davidson's trial was held, has 430,019 residents.[28] It is a tenth the size of the community analyzed in *Skilling* and a seventh the size of the community analyzed in *Mu'Min*. *See, Skilling*, 516 U.S. at 382; *Mu'min*, 500 U.S. at 429. Given Knox County's size, jury selection illustrated that Knox County was a "small world"[29] in a "small place,"[30] much closer to the communities

[28] PC Exhibit 15: Census Report.
[29] PC Exhibit 112: News Data Service Report at ¶¶ 740 (9/25/09)("It may be a small world. But it's even smaller in Knox County"); 735 (9/25/09)(same), 741 (9/25/09).
[30] PC Exhibit 116: 9/28/09 Knoxville News Sentinel at A5.

assessed in *Rideau*, *Estes*, and *Sheppard*.

As the Knoxville News Sentinel reported in a September 28, 2009, article, "trying to seat a Knox County jury to hear one of the community's most high profile cases is proving one thing: It really is a small world after all."[31] In the article, the Knoxville News Sentinel counted that prospective jurors for Mr. Davidson's trial included multiple individuals with connections to the victims or legal proceedings.[32] Local television stations similarly reported that prospective jurors included multiple individuals with connections to the parties and/or case.[33] The juror questionnaires from Mr. Davidson's trial reveal that one seated juror lived less than two miles from the Chipman Street house during the time of the offense and the trial.[34]

While Knox County is larger than the county analyzed in *Rideau*, the size of the community alone does not determine whether this *Skilling* factor supports a presumption of prejudice. Rather, the "characteristics of the community" are also relevant. *Skilling*, 561 U.S. at 382; *see, e.g., United States v. Casellas-Toro*, 807 F.3d 380, 386—386 (1st Cir. 2015)(presuming prejudice in a community of "more than 3 million people"). At the post-conviction hearing, Attorney Stephen Ross Johnson, who

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[31] PC Exhibit 116: 9/28/09 Knoxville News Sentinel at A5.

[32] These included (1) a teacher who taught at Ms. Christian's high school during the time Ms. Christian was there; (2) a woman whose child graduated that same high school with Ms. Christian's brother; (3) a woman who worked with Ms. Christian's father and remembered Ms. Christian dancing when Ms. Christian was young: (4) a billing clerk who worked where Ms. Christian's father was a patient; (5) a man whose brother had been represented by one of Mr. Davidson's attorneys; (6) a woman who had been on the venire for co-defendant Boyd's federal trial and whose husband served on the grand jury that indicted Davidson; and (7) a 911 operator who took telephone calls on the Christian/Newsom murders. *Id.*; *see also* PC Exhibit 112: News Data Service report at ¶ 778 (9/24/09).

[33] These included (1) a woman whose grandson went to school with Mr. Newsom;[33] (2) a college student who watched Cobbins's trial for her criminal law class;[33] (3) a person who had a long-standing relationship with the Newsom family;[33] and (4) a father whose daughter lived at the apartment complex where the carjacking allegedly took place. PC Exhibit 112: News Data Service Report at ¶ 737 (9/25/09).

[34] PC Exhibit 120: Voir Dire and Questionnaires of Seated Jurors at 504 (Juror Questionnaire of Amy F.). Neither the trial court, the State, or defense counsel asked this juror about her home's proximity to the crime scenes. *Id.* at 491—504.

represented one of Mr. Davidson's co-defendants, testified that Knox County residents paid unique attention to news involving the University of Tennessee. Mr. Johnson noted, "Anything involving... the University... is very much a big part of the community. It's hard to throw a rock in this town and not touch somebody that is not affiliated with the university in some way."[35] As a result, the death of Ms. Christian, a University of Tennessee senior, and Mr. Newsom, a college-age former baseball star, both of whom were beloved "not only [by] their families, but others in the community locally in their areas,"[36] involved a topic of the community's special interest. Mr. Johnson added that the coverage of the case "so saturated the community that... I've not seen anything or even heard anything like it."[37]

The Knox County community was united in its sympathy for the families of the victims. The deaths of Channon Christian and Christopher Newsom resulted in candlelight vigils,[38] the construction of a community memorial, [39] the creation of charity golf event,[40] and the establishment of a scholarship to the University of Tennessee in honor of Ms. Christian,[41] each of which generated significant media coverage. Further, the deaths of Mr. Newsom and Ms. Christian led to protests and white supremacist rallies, numerous editorials in the local newspaper, and a significant number of letters to the editor to the local paper, concerning both the community's response to the crime as well as their approval or disapproval of the way

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[35] PC Tr. at 109—110.
[36] PC Tr. at 117.
[37] PC Tr. at 119.
[38] PC Exhibit 112: News Data Service Report at ¶¶ 3271 (1/26/07), 3275 (1/25/07).
[39] PC Exhibit 116: 9/29/08 Knoxville News Sentinel at B1.
[40] PC Exhibit 116: 4/26/08 Knoxville News Sentinel at B1.
[41] PC Exhibit 112: News Data Service Report at ¶ 1772 (6/8/09).

it was portrayed in the press.

While this Court's analysis suggests that larger communities will have an easier time empaneling an impartial jury, Knox County's size did not mitigate the problems created by the publicity. The media publicized every aspect of this case, the underlying crime, and the legal proceedings from start to finish, with over three thousand television broadcasts, over three hundred articles in the Knoxville News Sentinel, and a comparable number of online commentaries. An extraordinary 96.79% of the Knox County venire had been exposed to publicity about this case, and over half of those polled in jury questionnaires admitted they had formed an opinion about the case or had possibly formed an opinion about the case.[42] In multiple media polls conducted while this case pended, over ninety percent of community members expressed their belief that the crimes committed warranted the death penalty; the most recent of these polls followed co-defendant Cobbins's trial, in which he received a sentence of life without the possibility of parole, just before Mr. Davidson's jury was empaneled.[43]

Every selected juror on Mr. Davidson's case had heard about the case prior to jury service and most of the seated jurors admitted to having formed opinions about the case.[44] In the juror questionnaire, when asked about publicized cases that had caught jurors' attention prior to their jury service, every sitting juror except one listed this case—the juror who did not list this case cited the O.J. Simpson trial.[45] One

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[42] PC Exhibit 108.
[43] PC Exhibit 112: News Data Service Report at ¶ 2956 (5/22/07), PC Exhibit 112: News Data Service Report at ¶ 1089 (8/27/09).
[44] PC Exhibit 120; PC TR 5, 602.
[45] *Id.*

seated juror admitted to "blogging" television personality Nancy Grace about the national media's apparent lack of coverage.[46] During a two week-period that members of the venire were permitted to enter back into the community without sequestration before Mr. Davidson's trial, a Knox County resident approached one perspective juror and said something "very dangerously prejudicial" about Mr. Davidson's prior record.[47] Another juror was approached by Christopher Newsom's best friend while he was at work.[48]

In sum, Knox County was a close-knit community one tenth the size of the community assessed in *Skilling*. Its relationship with the University of Tennessee provided a common pole of familiarity for Knox County residents. Most importantly, however, the size of the Knox County community did not mitigate the extent to which jurors were exposed to negative pretrial coverage in Mr. Davidson's case. Consideration of *Skilling*'s first factor supports a conclusion of presumed prejudice.

2. The media bombarded Knox County residents with blatantly prejudicial information concerning Mr. Davidson's case.

In finding there was no presumed prejudice in *Skilling*, this Court noted that "although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 561 U.S. at 382. Further, the publicity about Skilling "was less memorable and prejudicial" than in *Rideau*, in which the televised confession was "likely imprinted in the mind of anyone who

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[46] *Id.*
[47] PC Exhibit 2: Voir Dire 9/30/09, R. 1, 111.
[48] PC Exhibit 2: Voir Dire 10/2/09, R. 1, 101—102.

watched it." *Id.* Because the pretrial publicity contained no "evidence of the smoking-gun variety invit[ing] prejudgment of his culpability," this factor did not support a presumed prejudice finding. *Id.* In contrast to the publicity in *Skilling*, the publicity surrounding Mr. Davidson's case struck at the heart of his culpability for the crimes accused and their severity.

As in *Rideau*, the media published Mr. Davidson's statement to police in full to Knox County residents.[49] Additionally, the media publicized the statements of Mr. Davidson's co-defendants to law enforcement, in which they played up Mr. Davidson's role in the offense. [50] The testimony of co-defendant Letalvis Cobbins and his family members that characterized Cobbins as the "subordinate to an evil mastermind (Mr. Davidson)," [51] was broadcast live on television for any Knox County resident to watch.[52] At least one seated juror watched Cobbins' testimony on television and at least one juror watched Mr. Davidson's sister testify on Cobbins's behalf.[53]

This Court holds that a trial court commits prejudicial error when it admits a co-defendant's statement implicating the defendant unless the defendant has an opportunity to cross-examine the co-defendant. *Bruton v. United States*, 391 U.S. 123 (1968). As a result of the publication of Mr. Davidson's co-defendants' statements, Knox County residents read and heard that: (1) co-defendant Eric Boyd told

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[49] In this Court's direct appeal opinion in this case, this Court noted that Mr. Davidson provided "more than five different versions of what occurred" during his statement to police. *State v. Davidson*, 509 S.W.3d 156, 177 (Tenn. 2016). This Court relied upon Mr. Davidson's police statement in its analysis of the sufficiency of the evidence against Mr. Davidson. *Id.* at 214.

[50] PC Exhibit 116: 3/3/09 Knoxville News Sentinel at A3; *see* PC R. 4, 289-90; PC Exhibit 116: 1/31/09 Knoxville News Sentinel at A1.

[51] PC Exhibit 116: 8/27/09 Knoxville News Sentinel at A1.

[52] PC Exhibit 116: 8/27/09 Knoxville News Sentinel at A1.

[53] PC Exhibit 120.

authorities that Mr. Davidson was the person who hatched the plan to carjack the victims;[54] (2) co-defendant Cobbins told authorities that Mr. Davidson brought the victims into the Chipman Street house where the crime took place;[55] (3) co-defendant Thomas told authorities that Mr. Davidson carjacked Mr. Newsom and Ms. Christian, and Mr. Davidson took them to the Chipman Street house where the subsequent crime took place;[56] (4) co-defendant Boyd subsequently told authorities that Mr. Davidson said he carjacked Mr. Newsom and Ms. Christian,[57] he choked Ms. Christian,[58] he shot Mr. Newsom,[59] and he poured gasoline on Mr. Newsom and set him on fire;[60] (5) co-defendant Coleman told authorities that she saw Mr. Davidson tie Ms. Christian to a chair and a bed,[61] kill Ms. Christian by snapping her neck and choking her,[62] tie Ms. Christian's body into a fetal position, and put her body into a trash can;[63] (6) co-defendant Cobbins subsequently told authorities that Mr. Davidson and Boyd committed the crimes against Mr. Newsom and Ms. Christian;[64] and (7) co-defendant Cobbins subsequently testified at his trial that he saw Mr. Davidson kill

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[54] PC Exhibit 112: News Data Service Report at ¶ 3424 (1/13/07).
[55] PC Exhibit 112: News Data Service Report at ¶¶ 3368 (1/17/07), 3372–73 (1/17/07), 3378 (1/17/07), 3381-84 (1/16/07), 3386 (1/16/07), 3388 (1/16/07); PC Exhibit 116: 1/17/07 Knoxville News Sentinel at A5.
[56] *Id.*
[57] PC Exhibit 112: News Data Service Report at ¶¶ 2396 (4/15/08), 2404 (4/14/08), 2406 (4/14/08), 2408-09 (4/14/08).
[58] PC Exhibit 116: 4/15/08 Knoxville News Sentinel at A6; PC Exhibit 112: News Data Service Report at ¶¶ 2393 (4/15/08), 2401-03 (4/14/08), 2405 (4/14/08), 2408 (4/11/08), 2412-13 (4/14/08), 2415 (4/14/08).
[59] PC Exhibit 112: News Data Service Report at ¶ 2415 (4/14/08).
[60] PC Exhibit 112: News Data Service Report at ¶¶ 2393 (4/15/08), 2401-03 (4/14/08), 2405 (4/14/08); 2412 (4/14/08).
[61] PC Exhibit 112: News Data Service Report at ¶¶ 1964 (2/28/09), 1973 (2/27/09).
[62] PC Exhibit 112: News Data Service Report at ¶¶ 1958 (3/2/09), 1962 (3/2/09), 1967 (2/28/09), 1967-68 (2/27/09), 1973 (2/27/09); PC Exhibit 116: 2/28/09 Knoxville News Sentinel at A13, 3/3/09 Knoxville News Sentinel at A3.
[63] PC Exhibit 112: News Data Service Report at ¶¶ 1958 (3/2/09), 1967 (2/28/09), 1973 (2/27/09).
[64] PC Exhibit 112: News Data Service Report at ¶¶ 1333-39 (8/20/09), 1341-42 (8/20/09), 1346-50 (8/20/09), 1352 (8/20/09), 1355-56 (8/20/09), 1361 (8/18/09), 1363-66 (8/19/09), 1370-72 (8/19/09).

Ms. Christian and Mr. Newsom.[65] Because none of the co-defendants testified at Mr. Davidson's trial, all of their statements were inadmissible against him. Knox County residents learned of them nonetheless, and through them added to their inventory of information prejudicing them against Mr. Davidson.

The pretrial publicity told Knox County residents that DNA samples collected from Ms. Christian's rape kit matched DNA samples taken from Mr. Davidson.[66] The public and courts view DNA evidence as reliable proof connecting a suspect to a victim. *See State v. Scott*, 33 S.W.3d 746, 754 (Tenn. 2000)(DNA establishes a "substantial and definite connection" between a victim and a suspect). The pretrial publicity told Knox County residents that Mr. Davidson's fingerprint was found on a bank envelope inside Ms. Christian's vehicle.[67] The public and courts have long considered fingerprint evidence reliable proof for placing a suspect at a crime scene. *See State v. Toomes*, 191 S.W.3d 122, 131 (Tenn. Crim. App. 2005)("fingerprint evidence is unquestionably reliable"). The pretrial publicity told Knox County residents that authorities discovered Ms. Christian's body in the house where Mr.

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[65] PC Exhibit 112: News Data Service Report at ¶¶ 1070 (8/28/09), 1079 (8/28/09), 1085 (8/28/09), 1145 (8/26/09), 1284-86 (8/23/09), 1289-90 (8/22/09), 1295 (8/22/09).

[66] *See* PC Exhibit 116: 4/15/08 Knoxville News Sentinel at A6, 4/16/08 Knoxville News Sentinel at A7, 4/25/08 Knoxville News Sentinel at A14, 6/26/08 Knoxville News Sentinel at A6, 7/15/08 Knoxville News Sentinel at B3, 1/31/09 Knoxville News Sentinel at A14, 7/18/09 Knoxville News Sentinel at A10, 8/12/09 Knoxville News Sentinel at A12, 8/31/09 Knoxville News Sentinel at A12; PC Exhibit 112: News Data Service Report at ¶2386 (4/15/08), 2375 (4/15/08), 2249 (6/25/08), 2238 (7/3/08), 2236–237 (7/4/08), 1330 (8/20/09), 897 (9/17/08), 893 (9/17/08), 892 (9/18/09), 888–89 (9/18/09), 886 (9/18/09), 884 (9/18/09), 883 (9/18/09), 877 (9/18/09), 710 (9/28/09), 684 (9/29/09).

[67] *See* PC Exhibit 116: 4/13/08 Knoxville News Sentinel at B6, 3/14/09 Knoxville News Sentinel at A1, A12, 8/12/09 Knoxville News Sentinel at A12, 8/19/09 Knoxville News Sentinel at A11, 8/31/09 Knoxville News Sentinel at A12; PC Exhibit 112: News Data Service Report at ¶ 3437 (1/12/07), ¶ 3384–85 (1/16/07), 3382 (1/16/07), 2472 (4/10/08), 2453 (4/11/08), 1937–938 (3/13/09), 1398 (8/18/09), 926 (9/15/09).

Davidson lived.[68]

The pretrial publicity told Knox County residents that Eric Boyd's federal jury heard the above evidence, and it found Mr. Davidson carjacked and murdered Mr. Newsom and Ms. Christian.[69] Likewise, they were repeatedly exposed to reports from co-defendant Letalvis Cobbins's trial, in which he was found guilty of murder and sentenced to life imprisonment without the possibility of parole. This Court and others recognize such information is inherently prejudicial, *see Leonard v. United States,* 378 U.S. 544, 544 (1964); *United States v. Williams,* 568 F.2d 464, 470–71 (5th Cir. 1978), and they consider themselves "hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." *Williams*, 568 F.2d at 471; *see also Casellas-Toro,* 807 F.3d at 387 ("A jury may… have difficulty disbelieving or forgetting the opinion of another *jury,* twelve fellow citizens, that a defendant is guilty in an intertwined, just-concluded case")(emphasis in original).

The pretrial publicity told Knox County residents that a jury had previously

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[68] *See* PC Exhibit 116: 9/13/07 Knoxville News Sentinel at A8, 11/30/07 Knoxville News Sentinel at A1, A17, 3/7/08 Knoxville News Sentinel at B7, 3/8/08 Knoxville News Sentinel at B7, 4/3/08 Knoxville News Sentinel at B3, B7, 4/9/08 Knoxville News Sentinel at B2, 4/12/08 Knoxville News Sentinel at A1, 7/22/09 Knoxville News Sentinel at A5, 8/5/09 Knoxville News Sentinel at A5, 8/8/09 Knoxville News Sentinel at A7, 8/15/09 Knoxville News Sentinel at A15, 8/20/09 Knoxville News Sentinel at A7, 8/31/09 Knoxville News Sentinel at A12, 9/19/09 Knoxville News Sentinel at A4; PC Exhibit 112: News Data Service Report at ¶¶ 3527 (1/10/07), 3518 (1/10/07), 3515 (1/10/07), 3512 (1/10/07), 3509 (1/10/07), 3495 (1/11/07), 3481 (1/11/07), 3477 (1/11/07), 3460 (1/11/07), 3437 (1/12/07), 3433-434 (1/12/07), 3403 (1/15/07), 3385 (1/16/07), 3333 (1/18/07), 3325 (1/19/07), 3320 (1/19/07), 3315 (1/19/07), 3306 (1/24/07). 3305 (1/24/07), 3298 (1/25/07), 3280 (1/25/07), 3278 (1/25/07), 3024 (5/18/07), 3020 (5/18/07), 3018 (5/18/07). 2474 (4/10/08), 2452 (4/11/08), 1723 (7/17/09), 1709 (7/21/09), 1705 (7/22/09), 1704 (7/22/09), 1703 (7/22/09). 1701 (7/22/09), 1697 (7/22/09).

[69] *See* PC Exhibit 116: 9/13/07 Knoxville News Sentinel at A1, A8, 9/15/07 Knoxville News Sentinel at A1, 12/8/07 Knoxville News Sentinel at A7, 1/19/08 Knoxville News Sentinel at B3, 4/9/08 Knoxville News Sentinel at B2, 4/7/08 Knoxville News Sentinel at A1, 4/16/08 Knoxville News Sentinel at A7.

convicted Mr. Davidson of carjacking.[70] In ruling that the prosecution could not present that evidence to Mr. Davidson's jury, the trial court recognized that informing jurors about it would have a substantial prejudicial effect, and he ruled it inadmissible at Mr. Davidson's trial.[71]

The pretrial publicity also included information that would reasonably skew a potential juror towards death when determining Mr. Davidson's sentence. Though no testimony in his trial established what actions Mr. Davidson did or did not take during the offense,[72] the media continuously referred to him as the ringleader. The death penalty is reserved "for the most culpable defendants committing the most serious offenses." *Miller v. Alabama*, 567 U.S. 460, 476 (2012). The widely publicized arguments by Boyd's and Cobbins's lawyers that Mr. Davidson orchestrated the offense or did the actual killing would call for him to receive a higher sentence if his sentencing jury had heard them. However, as the arguments arose from testimony not included in the State's proof, the trial court would not have permitted it. Pretrial publicity repeatedly exposed Mr. Davidson's jurors to such inadmissible evidence.

Knox County residents also heard numerous and repeated calls for Mr. Davidson and his co-defendants to receive the death penalty from the victims' families. They were exposed to the community's shared sentiment that Mr. Davidson

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[70] See PC Exhibit 116: 1/11/07 Knoxville News Sentinel at A5, 7/18/09 Knoxville News Sentinel at A10, 8/12/09 Knoxville News Sentinel at A12, 9/9/09 Knoxville News Sentinel at A3, 10/7/09 Knoxville News Sentinel at A5; PC Exhibit 112: News Data Service Report at ¶ 3447 (1/12/07), 3020 (5/18/07), 3018 (5/185/07), 2472 (4/10/08), 1003 (9/1/09), 1000 (9/2/09), 993 (9/2/09), 973 (9/8/09), 972 (9/8/09), 966–69 (9/8/09), 958–62 (9/9/09), 955 (9/9/09), 653–52 (9/30/09).

[71] R. 40, 1031.

[72] The ballistics evidence that the State used to link Mr. Davidson to Mr. Newsom's murder was false. The State now concedes that the weapon found on Mr. Davidson at the time of his arrest was not the weapon used to kill Mr. Newsom.

and his co-defendants deserved the death penalty in the form of local media polls. [73] If introduced at a sentencing hearing, the families' and community's statements to the media would have violated the Eighth Amendment. *See Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991). A front-page news article displaying the victims' families' disappointment in a co-defendant receiving a life sentence, or television news stations broadcasting a victim's family member calling for Mr. Davidson's execution, had the effect of beaming this inflammatory sentiment to the entire venire. Placing such sentiments before a capital sentencing hearing jury violates the Constitution precisely because it is difficult or impossible for a juror to put it aside once it is heard. *See Skilling*, 561 U.S. at 382.

Further, the press coverage in the case illustrated two even more disturbing truths: (1) the extent to which rumors and innuendo were spreading throughout the Knox County community and (2) the extent that racial animus shaped the community's perception of the case. As to the former, the Knoxville News Sentinel was forced to publish an article dispelling some of the commonly held, and wildly prejudicial, rumors regarding the case, including that (1) "Christian was held captive four days"; (2) "Christian's breasts were cut off and Newsom's penis severed"; (3) "Christian was dismembered and placed in five separate trash bags"; (4) "Acid was poured down Christian's throat"; (5) "The slaying suspects allegedly targeted white people."[74] As to the latter, several online sources, some of which the Knoxville News

[73] PC Exhibit 112: News Data Service Report at ¶ 2956 (5/22/07), PC Exhibit 112: News Data Service Report at ¶ 1089 (8/27/09).
[74] PC Exhibit 17.

Sentinel provided links to for readers of its online edition, stoked racial flames, arguing that national media would have covered the case more extensively had the races of the victims and defendants been reversed,[75] expressing concerns of Black on white crime,[76] and even lamenting that this crime did not occur before the 1960s when "white society was frankly on guard against this very sort of thing, and held the Black population under a rule and a discipline."[77] *Compare Tsarnaev*, 968 F.2d at 56 (noting the coverage was "largely factual and the untrue stuff was no more inflammatory than the evidence presented at trial").

In sum, the media coverage surrounding Mr. Davidson's case repeatedly contained the types of prejudicial information that jurors could not reasonably be expected to shut from sight. Much of the information publicized was inadmissible at Mr. Davidson's trial. Given the blatantly prejudicial pretrial information the media outlets published, consideration of the second *Skilling* factor, like consideration of the first, supports a conclusion that Mr. Davidson's jury was presumptively prejudiced against him.

3. The media coverage in Mr. Davidson's case was extensive from the time of the crime through Mr. Davidson's trial, reaching its apex when co-defendant Letalvis Cobbins was tried just one month prior to jury selection in Mr. Davidson's case.

In finding no presumption of prejudice in *Skilling*, this Court relied on the fact that "over four years elapsed between Enron's bankruptcy and Skilling's trial." *Skilling*, 561 U.S. at 383. As this Court noted, the "decibel level of media attention

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[75] PC Exhibit 17 at 1/16/07 Jump the Shark, *Blogging a Double Murder*.
[76] PC Exhibit 17 at 1/16/07 Chris Roach man-sized target, *Another Horrific Inter-Racial Hate Crime*.
[77] PC Exhibit 17 at 1/13/07 The Color of Crime, *Part 2,553,227*.

diminished somewhat in the years following Enron's collapse." *Id.* Mr. Davidson was tried in October 2009, two years and nine months after the murders of Channon Christian and Christopher Newsom. Unlike in *Skilling*, the media coverage of Mr. Davidson's case persisted throughout this period, reaching its crescendo with the trial of co-defendant Letalvis Cobbins in August 2009, just before Mr. Davidson's jury was selected.

Throughout the pendency of Mr. Davidson's case, Knox County news sources saturated the community with information about the Christian/Newsom murders, the victims' parents' responses to losing their children and their commitment to having the defendants sentenced to death, the community's commitment to the victims' parents, and the legal proceedings against Mr. Davidson and his co-defendants. The Knoxville News Sentinel sent a reporter and photographer to every pretrial hearing.[78] Local news stations broadcasted from within the courtroom at each hearing.[79]

In the month of August 2009, when Cobbins was tried, local Knoxville stations carried 478 news stories about the case.[80] Every day of Cobbins's trial also generated a front-page story in the Knoxville News Sentinel, with summaries of the day's testimony, arguments, and quotes from the families of the victims. An estimated audience of 407,776 saw television broadcasts about Cobbins's testimony at his trial where he painted Mr. Davidson as the ringleader of the crime.[81] One week before jury

[78] TR 14 at 1941.
[79] *Id.*
[80] PC Tr. at 257.
[81] *Id.* at 258.

selection in Mr. Davidson's case, there were 98 television broadcasts in the Knoxville area about the Nashville jury's Cobbins verdict and less than death sentence that reached an estimated 2,985,994 people, including most of the jurors who decided Mr. Davidson's case.[82] Especially prominent in the coverage was the disappointment of the victims' family members that Cobbins had not received the death penalty. Less than one week before Mr. Davidson's potential jurors were called in to fill out questionnaires, the Knoxville News Sentinel published an article, in which family members of the victims were quoted as saying, "The jury let us down," "[t]hey've let Channon and Chris down," "[w]e were hoping for the death penalty," and "we're the ones under the death sentence."[83]

This is hardly evidence of waning community interest in the cases. Unlike *Skilling*, where the attention to the case faded, the coverage in Mr. Davidson's case persisted from start to finish. The coverage reached its highest volume with the most prejudicial content just before Mr. Davidson's venire reported for jury selection. Thus, this *Skilling* factor supports a finding of presumed prejudice.

4. The jury's conviction of Mr. Davidson on all charged counts and sentence of Mr. Davidson to four death sentences, while his co-defendants received life sentences for their involvement in the case, supports a presumption of prejudice.

Skilling involved a nineteen-count indictment alleging fraud and insider trading. *Skilling*, 561 U.S. 358. Skilling's jury acquitted him of nine insider-trading counts. *Id.* at 383. This Court placed "prime significance" on the acquittals in its

[82] *Id.* at 258—59.
[83] PC Exhibit 113.

presumed prejudice analysis. *Id.* In contrast to *Rideau/Estes/Sheppard*, where the jury's verdict "did not undermine in any way the supposition of juror bias," the multiple acquittals in *Skilling* ran counter to a presumption of prejudice. *Id.*

This Court also looked at the jury verdicts of Jeffrey Skilling's co-defendants in the Enron cases. *Id.* Specifically, the court paid heed to *United States v. Hirko*, No. 4:03–cr–00093 (S.D. Tex) where "the jury deliberated for several days and did not convict any Enron defendant," and *United States v. Bayly*, No. 4:03–cr–00363 (S.D. Tex) where the jury "acquitted a former Enron executive." *Id.* at fn. 16. Contrary to *Skilling*, the lower court refused to consider the results of Mr. Davidson's co-defendants' trial in its analysis. *Davidson*, at 66. This was an error, as it contradicted this Court's analysis in *Skilling* and ignored compelling evidence that supports a presumption of prejudice.

Mr. Davidson's jury did not acquit Mr. Davidson on any of the thirty-eight counts it considered.[84] While the jury found Mr. Davidson on a lesser included offense for the charge of Mr. Newsom's rape, that does not detract from a conclusion of presumed prejudice. Mr. Davidson was sentenced to death twice for each victim, i.e., he was sentenced to death for all death eligible offenses charged. *Compare United States v. Tsarnaev*, 968 F.3d 24, 56 (1st Cir. 2020)(noting that the defendant's jury only sentenced him to death for six of the seventeen death eligible counts in finding no presumption of prejudice). None of his co-defendants, all of whom received out-of-county juries, were sentenced to death. Each of the co-defendants were tried under a

[84] T.R. 52, 1342—50.

theory of criminal responsibility just like Mr. Davidson. For two of the co-defendants, the same three aggravating circumstances were found to apply.[85] A third co-defendant, Vanessa Coleman, was not convicted of first degree murder. Separating Mr. Davidson from his co-defendants were their respective juries, which were not tainted by pretrial publicity, including the victims' families' repeated calls for the death penalty, due to their counsel's decisions to request out-of-county venires. In sum, the fourth *Skilling* factor supports a finding of presumed prejudice.

5. The Court of Criminal Appeals assessment about the trial atmosphere runs contrary to the record.

Because the four *Skilling* factors show that prejudice should be presumed for counsel's deficient performance in failing to request a change of venue, Mr. Davidson should have prevailed with this post-conviction claim of ineffective assistance of counsel. In its analysis, the lower court stated that "this case did not present the same 'carnival atmosphere,' either before or during the trial, as those described by the Supreme Court as 'extreme cases.'" *Davidson*, at 65. The court's assessment that a "carnival atmosphere" is required before prejudice is presumed runs contrary to this Court's precedent.

In *Skilling*, this Court articulated the factors that should be considered when determining whether prejudice from a failure to move venue is presumed. *Skilling*, 561 U.S. at 382. None of those factors require a "carnival atmosphere" that intrudes

[85] The juries of George Thomas and Letalvis Cobbins imposed the same statutory aggravating circumstances in reaching their less-than-death sentence. A fourth aggravating circumstance, applied to Mr. Davidson, was found invalidated by the Court of Criminal Appeals in light of the post-conviction and error coram nobis proceedings below.

into the trial proceedings. In fact, in *Rideau*, this Court did not even discuss the trial proceedings at all: that the defendant's confession was broadcast three times to the local community was sufficient to presume prejudice without any examination of the voir dire or other aspects of the trial. *Rideau*, 373 U.S. 723. Likewise, in *Estes*, the media presence and attending stories from pretrial hearings was sufficient to presume prejudice. *Estes*, 381 U.S. 532; *see Skilling*, 561 U.S. at 380 (noting "extensive publicity before trial swelled into excessive exposure during preliminary court proceedings as reporters and television crews overran the courtroom and 'bombard[ed]... the community with the sights and sounds of' the pretrial hearing").

In *Sheppard*, this Court did note, however, that a "carnival atmosphere" pervaded the trial as part of its analysis, although much of this Court's analysis focused on the "virulent publicity about Sheppard." *Sheppard*, 384 U.S. 333. Even considering this as a factor, the lower court's assessment of Mr. Davidson's trial proceedings failed to consider the pernicious effects of the heightened community interest that crept into his trial.

Mr. Davidson's proceedings lacked the "calmness and solemnity" required by the due process provisions of the constitution. *Sheppard*, 384 U.S. at 341. Just like *Sheppard*, the courtroom in Mr. Davidson's trial was packed full every single day of trial with members of the media, family members of the victims and their supporters, members of the public, and an unusually large law enforcement presence.[86] There were camera operators throughout the courtroom.[87] The members of the media had

[86] PC Tr. at 84 (Testimony of Loretta Craves); PC Tr. at 116 (Testimony of Stephen Ross Johnson).
[87] PC Tr. at 116 (Testimony of Stephen Ross Johnson)

to find seating wherever it was available.[88] Regarding the large law enforcement presence, these officers were necessary to protect the defense team, who had been subjected to threats directed at them and their families for performing their court-assigned duties in representing Mr. Davidson. Defense team members, to protect themselves, would walk to court in a group or have friends and family members escort them to and from court.[89]

Members of the audience reacted audibly and visibly to the presentation of evidence, in full view and earshot of the jury. [90] Ms. Christian's father reacted angrily to the presentation of evidence at the trial in view of the jury. [91] Members of the victims' family and/or their supporters made disparaging and threatening comments to trial counsel.[92] They blocked the entrance to the courtroom and the path to counsel table.[93] One family member tried to trip an attorney for Mr. Davidson.[94] The trial court had to address the members of the audience, instructing them not to harass defense counsel and emphasizing that his attorneys were doing the job the court assigned them to do.[95] In addition, the members of the audience violated the court's instructions regarding victim support buttons depicting inadmissible life-in-being photographs of the victims.[96]

During the presentation of gruesome autopsy photographs, the jury witness

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[88] PC Tr. at 96 (Testimony of Loretta Cravens)
[89] PC Tr. at 97 (Testimony of Loretta Cravens).
[90] PC Tr. at 86 (Testimony of Loretta Cravens); PC Tr. at 89 (Testimony of Loretta Cravens).
[91] PC Tr. at 233 (Testimony of David Eldridge).
[92] PC Tr. at 11 (Testimony of Douglas Trant).
[93] PC Tr. at 10 (Testimony of Douglas Trant).
[94] PC Tr. at 11 (Testimony of Douglas Trant).
[95] PC Tr. at 89 (Testimony of Loretta Cravens).
[96] PC Tr. at 12 (Testimony of Douglas Trant).

the spectacle of a member of the district attorney's office fainting in court.[97] She was attended by the State's expert witness, a medical doctor, who was testifying about the injuries sustained by the victims prior to and after their deaths.[98] In a curative instruction provided by the court, the judge told jurors that they were not to consider anything that does not have evidentiary value, suggesting other improper information may have reached the jurors during the trial.[99] This was one of several admonitions the trial judge was forced to give the audience. The judge also had to admonish members of the audience to avoid straggling into the courtroom and disrupting the proceedings.[100] In violation of the trial court's repeated admonitions, members of the audience audibly gasped when Mr. Davidson's death sentence was announced.[101]

Adding to these problems was the trial judge's procurement and consumption of illegal opioids both before and during Mr. Davidson's trial.[102] Before and during Mr. Davidson's trial, trial judge Richard Baumgartner was illegally obtaining and taking Lortabs, Hydrocodone, Percocet, Roxycodone, and Xanax.[103] During Mr. Davidson's trial, the judge obtained ninety Hydrocodone pills from a pharmacy,[104] and he made daily trips to a hospital where his supplier, a hospitalized patient, gave

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[97] PC Tr. at 90 (Testimony of Loretta Cravens).
[98] *Id.*
[99] TR Vol. 55 at 1000—01.
[100] TR 46 at 71.
[101] TR 62 at 341.
[102] PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 IR #96 at 2; *id.* IR #148 at 2; IR #110 at 4; PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, RI #89 at 3; PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 IR #110 at 2-3; *id.* IR #164 at 2.
[103] PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 IR #96 at 2; *id.* IR #148 at 2; IR #110 at 4;
[104] PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, RI #89 at 3.

him illegal drugs.[105] On one such trip, when Baumgartner learned hospital staff had put his supplier on "no visitors" status, the judge "raised hell,"[106] claimed he was his supplier's attorney, and demanded an attorney-client privileged discussion with his "client."[107] Baumgartner told a nurse that he needed to see his supplier because he and his wife were mentoring troubled youth.[108] Baumgartner appeared "messed up," with "glassed-over," red eyes.[109] His supplier recognized the judge was "pill sick."[110] Judge Baumgartner's addiction issues eventually led to his disbarment and the reversal of multiple convictions that occurred around the time of Mr. Davidson's trial. Mr. Davidson's convictions/sentences were upheld, however, because Tennessee courts found that there was no indication that Judge Baumgartner was intoxicated on the bench during his trial (even though there was evidence that he was procuring large sums of opiate pain medications during Mr. Davidson's trial).

Again, *Skilling* and its predecessors do not require a "carnival atmosphere" to find a presumption of prejudice. It is a factor that may be considered in a court's analysis, and here, it supports a presumption of prejudice rather than weighing against it.

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[105] PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 IR #110 at 2-3; *id.* IR #164 at 2.
[106] PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 IR #164 at 2.
[107] PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 IR #176 at 1.
[108] PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 IR #177 at 1.
[109] PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 IR #164 at 2.
[110] PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 RI #147 at 2. The judge's addiction became so consuming that he was taking ten to twenty opiate pills a day, PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 IR #13 at 3; *id.* IR #96 at 3, and he began snorting them. PC Exhibit45: Tennessee Bureau of Investigation File, Case No. KX-82A-000083, 1/26/11 IR #13 at 3. The State removed him from the bench, and the federal Government prosecuted him for protecting the persons who supplied him. *See United States v. Baumgartner,* 581 Fed.Appx. 522 (6th Cir. 2014).

B. Over half the seated jurors had preformed opinions about the case and others expressed other information that revealed disqualifying bias.

As this Court warns, "[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." *Irvin v. Dowd*, 366 U.S. 717, 727 (1961). Over half of the prospective jurors who filled out questionnaires in Mr. Davidson's case admitted to having preformed opinions about the case.[111] The lower court's opinion reflects that eighty prospective jurors were excused for cause. *Davidson v. State*, No. E2019–00541–CCA–R3–PD, at 62 (Tenn. Crim. App. Aug. 26, 2021). This is striking, as most of the jurors who sat on Mr. Davidson's trial, who were obviously not struck for cause, admittedly began their jury service with preformed opinions about this case.

Seven of the sitting jurors indicated that they had formed opinions about the guilt of Mr. Davidson or his co-defendant Letalvis Cobbins, who was tried shortly before Mr. Davidson's jurors filled out their questionnaires. This included two jurors who believed Mr. Davidson was "probably guilty."[112] Six jurors indicated their belief that Cobbins was "probably" or "definitely guilty."[113] The State proceeded under a theory of criminal responsibility for all four defendants, including Mr. Davidson. As the State pointed out in the proceedings below, the State "really [did not] care which one of them committed any particular act.[114] For the seated jurors who believed Mr. Davidson was guilty, the State had essentially met its burden through the pretrial

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[111] PC Exhibit 108.

[112] Juror Cynthia G. and Juror Rodney R. both marked on their questionnaire that they believed Mr. Davidson was probably guilty. *See* PC Exhibit 120.

[113] Jurors Daniel A., Darryl A., Katherine D., Ann C., Rodney R., and Jane P. marked on their questionnaire that they believed Cobbins was "definitely guilty" or "probably guilty."

[114] ECN Tr. at 68—70.

media exposure. For the jurors who had already formed opinions about Cobbins's guilt, the State had already satisfied most of its burden, as Cobbins and the other co-defendants were indisputably present in Mr. Davidson's home when the crimes occurred. *See* Tenn. Code Ann. § 39–11–402 (Criminal Responsibility).

With Mr. Davidson's trial coming at the heels of co-defendant Cobbins's trial and the media barrage that attended it,[115] most of the jurors were subjected to coverage that prejudiced Mr. Davidson. Specifically, most of the seated jurors knew that Cobbins had been convicted and sentenced to life without parole rather than the death penalty, a sentence of which the families and Knox County community disapproved.[116] Two jurors admitted to watching testimony from the Cobbins trial, which included Cobbins's own testimony and Mr. Davidson's sister's testimony.[117] For both of these testifying witnesses, Mr. Davidson was cast as the principal culprit in the crimes charged, with Cobbins providing testimony that he was the "subordinate to an evil mastermind," and Mr. Davidson's sister providing testimony that she was surprised at Cobbins's role in the offense, but unsurprised at Mr. Davidson's role. Moreover, all the seated jurors were familiar with the Cobbins case as evidenced by the questionnaires, but five jurors were not asked questions about their exposure to information about the case during voir dire.[118] Despite their admitted exposure to this prejudicial information, the seated jurors were not probed on the source of their knowledge, the specific content of their knowledge, or the extent to which they were

[115] Knoxville television stations carried 478 broadcast segments about the Cobbins trial. PC Tr. at 257.
[116] PC Exhibit 120.
[117] PC Exhibit 120 (Voir Dire of Jurors Lara K. and Rodney R.).
[118] PC Exhibit 120 (Voir Dire of Jurors Robert G., Daniel A., Ann C., Daniel N. and Amy F.).

prejudiced by such knowledge.

Other seated jurors also indicated they had preformed opinions about the case, although they stopped short of admitting a belief that Mr. Davidson was guilty. Jurors Katherine D. and Jane P. admitted that they had formed opinions about Mr. Davidson's involvement, but marked that they were "unsure" what their opinions were on their questionnaires.[119] Juror Amy F. admitted that it was "hard not to form an opinion" based on the information she had heard.[120] Juror Robert G. admitted to having conversations with co-workers who had formed opinions about the defendants' guilt that included a discussion of the defendants' race, but he was not asked to expound on those conversations.[121] Juror Katherine D. admitting to hearing information that Mr. Davidson was the ringleader of the offense and writing to television commentator Nancy Grace so the case would garner national media attention.[122]

Other circumstances present during jury selection raise doubts regarding jurors' ability to set aside pretrial information to which they were exposed. The Knoxville News Sentinel published an article suggesting motivated jurors could lie their way onto Mr. Davidson's jury; one juror was caught doing just that and excluded.[123] The trial judge, acting as gatekeeper at Mr. Davidson's trial, was obtaining through illegal means and ingesting narcotic pain killers during Mr.

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[119] PC Exhibit 120.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] PC Exhibit 116 (8/25/09 Knoxville News Sentinel at A9).

Davidson's trial.[124] Jurors, including Katherine D., whose complaints that the case generated only local media attention mirrored those of white supremacist groups who protested in Knoxville, were not probed on their potential racial biases despite multiple indicia that the reporting on this case generated a racially motivated response from the community. Jurors were permitted to return to the Knox County community in the middle of jury selection; one sitting juror had a conversation with the victim's best friend during this period and another prospective juror heard something "very dangerously prejudicial" about Mr. Davidson's prior record.[125] These circumstances cast doubt on the court's ability to rely on jurors' assurances of impartiality.

In sum, most jurors who sat on Mr. Davidson's trial admitted to having an opinion of the case prior to their jury service. More jurors entered the courtroom with preformed opinions about the case than occurred in *Rideau*, where this Court found a presumption of prejudice existed based on the defendant's televised confession that only three of the jurors admitted to having seen. *See Rideau v. Louisiana*, 373 U.S. 723 (1963). The jurors' admission of their preformed opinions does nothing to rebut presumed prejudice and, in fact, demonstrates actual bias infected Mr. Davidson's jury.

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[124] *See* PC Exhibit 45. In *Skilling*, the court noted "primary reliance on the judgment of the trial court makes especially good sense because the judge sits in the locale where the publicity is said to have had its effect and may base her evaluation on her own perception of the depth and extent of news stories that might influence a juror." *Skilling*, 561 U.S. at 386. Given the circumstances, reliance on the trial judge does not strengthen the conclusion that prejudice did not affect the jury.

[125] PC Exhibit 2, Voir Dire 9/30/09 at 111.

II. Petitioner's counsel's deficient performance in failing to request a change of venue considering the pretrial publicity leading up to trial created a structural error that resulted in a fundamentally unfair trial.

As set forth above, the present case falls into that narrow category of "extreme" cases where prejudice may be presumed. Had Mr. Davidson been denied a change of venire by the trial court, his convictions would be overturned despite the seated jurors professed impartiality and claimed ability to base their decisions solely on the evidence presented at trial. *See*, *Skilling*, 561 U.S. 358 (2010). But the trial court did not deny Mr. Davidson; instead, Mr. Davidson's trial counsel's deficient performance denied him a jury that was not presumptively biased. In denying relief, the lower court noted that "[t]his is not a direct review of his convictions and sentences, as was the case in *Skilling*," and thus applied the prejudice test articulated in *Strickland*, which required petitioner to "demonstrate that actual prejudice resulted from counsel's decision." *Davidson*, at 65. This is a perverse result because:

(1) It requires Mr. Davidson to establish proof of prejudice for a structural error that the courts consider "simply too hard to measure" and that "always results in fundamental unfairness"; and

(2) It involves the type of mechanical application of the ineffective assistance of counsel test that *Strickland v. Washington*, 466 U.S. 668 (1984) expressly cautions against.

A. Structural errors of this type are not amenable to the actual prejudice standard applied by the lower court.

This Court has recognized that structural errors warrant automatic reversal. Under this Court's precedent, structural error is not "simply an error in the trial process itself" but one that "affect[s] the framework within which the trial proceeds."

Gonzalez-Lopez, 548 U.S. at 148 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309—310 (1991)). Errors are considered structural for a variety of different reasons, including when "the effects of the error are simply too hard to measure" or where they "always result in fundamental unfairness." *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017). Measuring the harm inflicted by a structural error on the parties is often a "practical impossibility." *Waller v. Georgia*, 467 U.S. 39, 49 n. 9 (1984). These errors, by their very nature, are "intrinsically harmful." *Neder v. United States*, 527 U.S. 1, 7 (1999).

In this Court's line of presumed prejudice venue cases, this Court reversed due to structural error without requiring a showing of prejudice. Key to those determinations is the reality that proving actual juror bias under those circumstances is an impossibility and, indeed, is often contradicted by the jurors' voir dire testimony that they can decide the case impartially. *Rideau*, 373 U.S. at 732 (where all jurors stated they could set aside what they had heard and base their decision solely on the evidence presented at trial); *see*, *Patton*, 467 U.S. 1025 (noting that jurors' claims of impartiality "should not be believed" where a presumption of prejudice arises); *State v. Smith*, 357 S.W.3d 322, 345 (Tenn. 2011)("Rare is the person, layman or judge, who will admit bias or lack of impartiality in performing a duty or responsibility, before or after the fact"). An inquiry into what extent Mr. Davidson's jurors were swayed by the blatantly prejudicial pretrial media or the opinions they formed as a result of such exposure "would be a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). This

Court has expressly disfavored such an approach for this type of error in "extreme cases" of pretrial publicity as determined by the *Skilling* factors. *Id*; *Skilling*, 561 U.S. 358.

Moreover, this type of structural error always results in a fundamentally unfair trial. The right to an impartial jury is among those structural rights "whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *See Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). There is arguably no right more fundamental than a criminal defendant's right to trial before impartial jurors. In cases reaching the level of presumed prejudice under the factors articulated by *Skilling*, the structural error cannot be cured solely by jurors' assertions of impartiality and is not subject to harmless error analysis, in part, because of the type of right at issue and its constitutional importance to the criminal justice system. *See, also, Meadows v. Lind*, 996 F.3d 1067, 1076 (10th Cir. 2021)(noting that "a defendant did not need to show actual prejudice when his attorney's deficient performance led to structural errors [that]... always result[] in fundamental unfairness"); *Reams v. State*, 560 S.W.3d 441, 22 (Ark. 2018)(holding that trial counsel's failure to raise a fair cross-section challenge creates a structural error that "necessarily renders one's trial fundamentally unfair" for which no showing of actual prejudice is required under *Strickland*).

Requiring Mr. Davidson to establish actual prejudice for his trial counsel's errors here is a Catch-22. The problem created by his trial counsel's deficient performance is the type that cannot be proved, because jurors' statements on their

impartiality cannot be trusted under these circumstances. Yet, the lower courts forced Mr. Davidson to prove actual bias, presumably through the statements of the seated jurors. This approach cannot be reconciled with the *Rideau/Estes/Sheppard/Skilling* line of cases, nor is it consistent with the principles of fundamental fairness articulated in *Strickland*. Given the structural right at issue always results in a fundamental unfairness when denied, presuming prejudice is appropriate. For these reasons, the lower court's requirement of an actual prejudice showing was improper.

B. This Court and others have altered *Strickland*'s prejudice prong where necessary to avoid fundamental unfairness.

In most cases addressing claims of ineffective assistance of counsel, the proper prejudice showing requires the petitioner to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687. While this is the test commonly applied in ineffective assistance of counsel cases, *Strickland* expressly cautioned courts to avoid the "mechanical" application of its requirements. *Id.* at 696. Rather, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.*

The notion of fundamental fairness, likewise, lies at the heart of this Court's venue cases. *See, e.g., Rideau*, 373 U.S. at 727 (holding "[d]ue process of law, preserved by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death"); *Estes*, 381 U.S. at 543 (noting that the trial proceedings tainted by pretrial publicity were "inherently lacking in due

process"); *Sheppard*, 384 U.S. at 352 (noting "our system of law has always endeavored to prevent even the probability of unfairness"). Given that the presumed prejudice doctrine and *Strickland*'s standard both seek to redress fundamentally unfair trials, *Strickland* cannot stand for the proposition that a defendant must show actual prejudice resulting from his counsel's errors where other case law demonstrates such a showing is an impossibility not worth undertaking.

Courts have presumed the prejudice prong of the ineffective assistance of counsel analysis under several circumstances. *See, e.g.*, *United States v. Cronic*, 466 U.S. 648 (1984). In *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998), the court determined that counsel's failure to inform the defendant of his right to a trial by jury created a structural error for which no showing of prejudice was required under *Strickland*. Similarly, in *Quintero v. Bell*, 368 F.3d 892 (6th Cir. 2012), the court determined that counsel's failure to object to the presence of jurors who had convicted his co-defendants on his jury warranted a presumption of prejudice. *Id.* In *Krogmann v. State*, 914 N.W.2d 293 (Iowa 2018), the Iowa Supreme Court found that the structural error at issue "affected the entire proceeding" and implicated the "fundamental fairness" of the proceeding, and thus presumed prejudice for the defendant's ineffective assistance of counsel claim. *Id.* The same occurred in *Reams v. State*, 560 S.W.3d 441, 22 (Ark. 2018), where the Arkansas Supreme Court determined that the defendant's ineffective assistance of counsel claim for failing to raise a cross-section challenge required no actual prejudice showing. *Id.* The logic of these cases is clear: where a lawyer's deficient performance results in a structural

error whose precise prejudicial effects are undiscoverable and/or always result in a fundamentally unfair trial, a claimant need not prove actual prejudice to succeed on his ineffective assistance of counsel claim.

The requirement of actual prejudice under *Strickland* exists as a reflection of the "presumption of reliability" that courts afford to all judicial proceedings. *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000); *Smith v. Robbins*, 528 U.S. 259, 286 (2000). Accordingly, the normal *Strickland* case seeks to determine "whether, despite the strong presumption of reliability," accorded to criminal trials, "the result of the particular proceeding is unreliable." *Strickland*, 466 U.S. at 696. No such presumption of reliability exists in the present case. To the contrary, as set forth above, this case involves a presumption that jurors who heard Mr. Davidson's case, convicted him, and sentenced him to death were biased by pretrial media exposure. This was the reasoning behind *Cronic*, where the court determined that the errors complained of made "the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. 648. In sum, the court's application of the *Strickland* prejudice prong in which it required a showing of actual juror bias despite the structural error caused by trial counsel's deficient performance, was erroneous. This approach involved a mechanical application of the *Strickland* test that this Court disfavors. This Court should take the opportunity to reverse.

CONCLUSION

For the foregoing reasons, Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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