No. 21-7300

IN THE SUPREME COURT OF THE UNITED STATES

LEMARICUS D. DAVIDSON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

RESTATEMENT OF THE QUESTION PRESENTED

Whether reviewing courts must presume prejudice for trial counsel's alleged deficiency in failing to request an out-of-county jury venire despite extensive pre-trial publicity when counsel and the trial court undertook extensive measures to root out potential juror bias and to ensure that the accused received a fair trial.

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JURISDICTIONAL STATEMENT

This Court has subject matter jurisdiction under 28 U.S.C. § 1257(a) in connection with the petitioner's ineffective-assistance claim. However, to the extent Davidson is advancing a freestanding due process claim regarding pre-trial publicity, which the Tennessee Court of Criminal Appeals found to be waived, this Court lacks jurisdiction to consider a claim resolved on an independent and adequate state law basis, such as waiver. *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (noting that an "adequate and independent state procedural disposition strips th[e] Court of certiorari jurisdiction to review a state court's judgment").

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel in his defense." The Fourteenth Amendment further provides that "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

INTRODUCTION

LeMaricus Davidson, in concert with his half-brother and friends, carjacked a young couple in an apartment parking lot, bound them, kidnapped them, brought them back to his house, and brutally raped them. At his direction, two of his cohorts took the male victim, Christopher Newsom, to an industrial area where he was marched barefoot to the place of his murder, forced to his knees, and shot fatally three times from behind. Newsom was then doused with gasoline, and his body was set on fire. Meanwhile, back at Davidson's house, Davidson and his half-brother raped the female victim, Channon Christian, in multiple orifices, leaving behind extensive bodily injury, as well as Davidson's semen and DNA. Bleach was then sprayed down her throat in an unsuccessful attempt to get rid of some of the DNA evidence. Davidson, among others, entombed her in five plastic garbage bags and stuffed her in a large trash can in which she slowly suffocated. Davidson's prints would be found on three of the garbage bags. Afterward, Davidson was seen wearing Newsom's shoes, gave Christian's possessions to Davidson's girlfriend as a gift, and drove around in Christian's stolen car. He committed these crimes in Knox County, Tennessee, where he was ultimately charged with, among other offenses, first-degree murder.

After extensive consultation with his lawyers, Davidson chose to demand as his constitutional right[1] that he receive a Knox County jury venire for his trial despite the extensive pre-trial publicity of these killings. The trial court accepted his demand and undertook extensive measures to ensure that he received a fair trial in front of an unbiased jury. There were 6,533 pages of juror questionnaires filled out by the prospective jurors. Each questionnaire contained 128 questions, some with multiple subparts, to gauge exposure to pre-trial publicity, possible racial

[1] The Tennessee Constitution provides: "That in all criminal prosecutions, the accused hath the right . . . in prosecutions by indictment or presentment, [to] a speedy public trial, by an impartial jury of the County in which the crime shall have been committed . . . ." Tenn. Const. art. I, § 9.

bias, possible pre-formed opinions, and other criteria relevant to picking a jury. The State brought in 200 prospective jurors to engage in voir dire over nine days. The voir dire covers more than 2,300 pages of transcript. The trial court liberally dismissed prospective jurors for cause, and the parties further exercised peremptory challenges. Notably, Davidson's trial counsel did not exercise all their peremptory challenges and testified that they would have done so if they had felt any seated juror should have been excused for cause but was not.

Most of the seated jurors had only limited exposure to the pre-trial publicity. All the jurors agreed, moreover, that they would hold the State to its burden of proof and would render an impartial verdict based only on the evidence presented at trial. And defense counsel, among others, questioned the jurors during voir dire to make sure that these assertions were accurate.

After his various trial strategies failed, Davidson came to argue, as he does here via an ineffective-assistance claim, that his constitutional rights were violated by *not* having his case heard by out-of-county jurors. He posits that the *Strickland* prejudice prong must be analyzed not under *Strickland* but under the *Skilling* test for presumptive prejudice in a freestanding pre-trial-publicity claim.[2] He further argues essentially that the state post-conviction court incorrectly applied *Skilling* not to impose an irrebuttable presumption of prejudice. Pet. 9-33.

Davidson's petition fails for multiple reasons. *First*, he has failed to cite any law holding that *Strickland* prejudice does not attend an ineffective-assistance claim regarding pre-trial publicity, much less demonstrated a conflict in the case law needing this Court's attention. *Second*, his reasoning conflicts with this Court's more recent decisions, as well as the holdings of multiple circuit courts of appeals, regarding freestanding claims of pre-trial publicity.

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[2] *Skilling v. United States*, 561 U.S. 358, 385-99 (2010); *Strickland v. Washington*, 466 U.S. 668 (1984).

Third, even if one were to accept Davidson's dubious application of presumptive prejudice to ineffective-assistance claims regarding pre-trial publicity, his case is still a poor vehicle for review. He implies that the state post-conviction court below misapplied *Skilling*, and he affirmatively states that the state courts' finding of fact regarding the courtroom atmosphere was erroneous. But alleged misapplication of the law or alleged erroneous finding of fact are, in general, not proper bases for this Court's review. Nor was there error. *Last*, this case also presents a bad vehicle to explore the issue because the trial court's extensive jury-screening measures did serve to rebut any presumptive prejudice, were it to exist.[3] For these reasons, the Court should decline review.

[3] As noted, to the extent Davidson is advancing a freestanding *Skilling* claim regarding pre-trial publicity, this Court lacks jurisdiction to consider a claim resolved on an independent and adequate state law basis, such as Davidson's waiver of a freestanding due process claim. *Haley*, 541 U.S. at 392.

STATEMENT OF THE CASE

I. The Crimes

In January 2007, Davidson, along with George Thomas, Letalvis Cobbins, Eric Boyd, and Vanessa Coleman, kidnapped Newsom and Christian at gunpoint from an apartment parking lot in Knoxville, Tennessee. Pet. App. 2a, 82a. Davidson and the others tied the victims' hands behind their backs and stole their money and personal items. Pet. App. 2a, 82a. They also stole Christian's car and drove it, with the bound victims inside, back to Davidson's house. Pet. App. 2a, 82a. Newsom was anally raped with sufficient force to cause bodily injury. Pet. App. 3a, 46a. After taking Christian into his front bedroom, Davidson told Thomas to go with Boyd, who gathered Newsom and drove him behind a warehouse. Pet. App. 82a. Boyd walked Newsom, barefoot, across a drainage ditch behind a strand of trees. Pet. App. 2a, 83a. Newsom, gagged with his own socks and blindfolded, was shot fatally three times from behind. Pet. App. 2a-3a. The bullets were consistent with having been fired from Davidson's gun. Pet. App. 2a. Boyd grabbed a gas can, wrapped Newsom's body in a comforter, poured gasoline on him, and set him aflame to hide evidence of the murder. Pet. App. 2a. Boyd and Thomas, without Newsom, drove back to Davidson's house and told Davidson, "That's done" to which Davidson responded, "Okay." Pet. App. 83a.

Meanwhile, Davidson, among others, repeatedly beat Christian in Davidson's house and raped her in the mouth, anus, and vagina. Pet. App. 3a. She suffered "tremendous" injuries, especially to her anus and genital areas, one to two hours before her death. Pet. App. 3a. Davidson's DNA was found in her vagina and anus, as well as on her jeans. Pet. App. 4a. Bleach was sprayed into her mouth to attempt to destroy the rapist's DNA left there. Pet. App. 47a. She was placed into five plastic garbage bags in a tight fetal position and stuffed in a garbage can where

she slowly suffocated. Pet. App. 4a. Davidson's prints were on three of the five plastic garbage bags containing her body, as well as on items belonging to both victims. Pet. App. 4a. While Christian was dying in the garbage can, Davidson left to spend time with his girlfriend, to whom he gave Christian's clothes and other personal items. Pet. App. 3a. He was seen driving Christian's stolen car, which he wiped down in an attempt to remove his fingerprints. Pet. App. 47a, 84a.

Davidson, wearing Newsom's shoes, was arrested a few days later. Pet. App. 3a, 89a. Davidson told authorities more than five different versions of what occurred and ultimately blamed Cobbins and Thomas for the carjackings and everything else that followed. Pet. App. 3a.

Davidson and three co-defendants were charged with the first-degree murders, especially aggravated robberies, especially aggravated kidnappings, and aggravated rapes of Newsom and Christian, as well as theft. *State v. Davidson*, No. E2013-00394-CCA-R3-DD, 2015 WL 1087126, at *1 (Tenn. Crim. App. Mar. 10, 2015), *aff'd in part* 509 S.W.3d 156 (Tenn. 2016), *cert denied* 138 S. Ct. 105 (2017).

II. Trial Court's measures to ensure a fair trial with an unbiased jury

As demanded by Davidson, the trial court brought in a Knox County venire. The prospective jurors were provided with a juror questionnaire with 128 questions, including over 30 questions regarding exposure to the media and other information regarding the Newsom and Christian murders. Pet. App. 61a; R. Exs. 96, 108. The questionnaires also included questions about racial issues and divulged details about the case, such as the burning of Newsom's body or the recovery of Christian's body from a trashcan, to gauge the potential jurors' reactions to the forthcoming evidence. *See, e.g.*, R. Ex. 96 at 27. The prospective jurors filled out, in total, 6,533 pages of questionnaire responses. R. Ex. 108. Davidson's counsel had a jury consultant pour over

the questionnaires, investigate the potential jurors, and make favorability ratings for each. R. VI 49; VII, 103. Then, the trial court and the parties engaged in an extensive jury-selection process encompassing nine days with 200 prospective jurors over the course of September 2009. R. Ex. 108. A member of Davidson's defense team commented that Davidson's trial lawyers were very methodical during the voir dire process. Pet. App. 13a.

While all the jurors who would render a verdict had heard of the murders beforehand, nine indicated that they had no opinion as to whether Davidson was involved. Pet. App. 62a. Two had heard that he was involved but were unsure if he was guilty or not. Pet. App. 62a. Only one opined that Davidson was "probably guilty" but assured the trial judge that he could set that view aside. Pet. App. 62a.[4] That same juror was the only one that had "watched more than a snatch" of Cobbins' trial. Pet. App. 62a. Significantly, the trial court and the parties questioned him extensively about his potential bias; the trial court concluded that he should not be excused for cause; and defense counsel did not feel that a peremptory challenge was warranted either. R. VI, 51; Ex. 2, 9/28 Tr. at 232-33, 241; Ex. 108 at 6405-27.[5]

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[4] Petitioner complains that prospective juror Cynthia G. marked on her questionnaire that Davidson was "probably guilty." Pet. 30 & n.112. Cynthia G., however, was not one of his final 12 jurors: (1) Amy F., (2) Ann C., (3) Chris B., (4) Daniel A., (5) Daniel N., (6) Darryl A., (7) Greg W., (8) Jane P., (9) Katherine D., (10) Lara K., (11) Robert G., and (12) Rodney R. rendered his verdicts. Similarly, Davidson complains about some jurors' preformed opinions about co-defendant Letalvis Cobbins' guilt. Pet. 30 & n.113. Such opinions were hardly surprising: Cobbins had just been found guilty of the murders by a jury of his peers. And his guilt was no basis for complaint for Davidson, whose defense was that Cobbins and the others, not he, committed the rapes and murders. R. VIII, 222; Direct Appeal R. LVII, 1254-69. That said, Davidson incorrectly states that a majority of the jury had a preformed opinion of Cobbins' guilt. Only five jurors believed he was guilty. R. Ex. 108 at 6143, 6166, 6212, 6235, 6420.

[5] The Tennessee courts found that counsel was not deficient for failing to exhaust all the peremptory challenges, including a possible one on this juror, and Davidson has not challenged that finding in his petition for writ of certiorari. Pet. App. 68a.

Otherwise, the jurors indicated that their exposure to the pre-trial publicity was limited. For example, one juror testified, "I just don't watch the news a whole lot." R. Ex. 2, 9/22 Tr. at 20. Another testified, "I don't really watch the news. I do with sports. I don't read much I the paper unless it's sports or real estate." R. Ex. 2, 9/23 Tr. at 288. Still another said, "I don't watch a whole lot of local news." R. Ex. 2, 9/32 Tr. at 141, 151. Other answers were similarly reassuring. R. Ex. 2, 9/21 Tr. at 135, 136, 140, 144, 145, 146; 9/22 Tr. at 20, 95; 9/23 Tr. at 141, 145; 9/25 Tr. at 24, 46; 9/29 Tr. at 87, 227, 228.

As noted, all the jurors testified that they had no opinion about the case or that they would hold the State to its burden of proof and render verdicts based solely on the evidence presented at trial. R. Ex. 2, 9/21 Tr. at 136, 140; 9/22 Tr. at 21, 96-97, 110, 115; 9/23 Tr. at 141-42, 288; 9/25 Tr. at 26, 47; 9/28 Tr. at 232-33, 241; 9/29 Tr. at 88, 92, 229-30, 256, 259. "Q. I noticed that you indicate that you have not formed any opinion about Mr. Davidson's involvement in the case, or that you have? A. No. Without—without proof, how can you form an opinion?" R. Ex. 2, 9/23 Tr. at 141. "Basically the way, like I said, our judicial system's set up, we come in here, you listen to both sides, and you make a decision based on that. I mean, it's—it's—and if I was in his shoes, I would want the same—I would want to be treated the same way." R. Ex. 2, 9/25 Tr. at 26.

The trial court also gave extensive instructions on burden of proof, avoiding media exposure, and the perils of believing everything one hears on the news. R. Ex. 2, 9/1 Tr. at 7-26; 9/21 Tr. at 4-13, 171-81; 9/22 Tr. at 3-18; 9/23 Tr. at 6-19; 9/24 Tr. at 14-27; 9/25 Tr. at 6-22; 9/28 Tr. at 12-24, 151-58; 9/29 Tr. at 37-53, 189-205; 9/30 Tr. at 3-16; 10/2 Tr. at 22-28. As jury selection was winding down, the trial judge commented, "We know a lot about these people, and—and you know, we've had the opportunity to examine these people, to talk to them, look them in the eye." R. Ex. 2, 9/30 Tr. at 103. "We—we have excluded anybody who—who, in my judgment,

have hinted to us that they can't base their opinion solely on what they hear in this courtroom, and in addition to that, we've questioned very closely about their opinions about punishments." R. Ex. 2, 9/30 Tr. at 103. The trial court excused 34 of the 200 jurors for cause due to the pre-trial publicity. Pet. App. 62a.

The parties exercised their peremptory challenges. R. Ex. 2, 10/2 Tr. Notably, defense counsel did not exhaust their challenges and testified that they would have exercised a challenge on any juror they thought should have been excused for cause but was not. R. VI, 51.

III. Conviction and sentencing

After a contested trial, Davidson was convicted on multiple counts of first-degree murder, especially aggravated robbery, especially aggravated kidnapping, and aggravated rape, but he was also acquitted on three counts of aggravated rape. On those counts, he was found guilty merely of facilitation. *State v. Davidson*, 509 S.W.3d 156, 170 (Tenn. 2016), *cert. denied* 138 S. Ct. 105 (2017); Pet. 24.[6] The jury also rendered capital verdicts on the murder counts after finding that (1) the murders were especially heinous, atrocious, and cruel; (2) the murders were committed for the purpose of avoiding, interfering, or preventing a lawful arrest; and (3) the murders were committed during the perpetration of another felony. Pet. App. 5a. The jury further found, in connection with Newsom's murder, that the defendant knowingly mutilated the body of the victim after death. Pet. App. 5a.

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[6] Facilitation is defined under Tennessee law as follows: "A person is criminally responsible for the facilitation of a felony, if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403(a).

IV. Post-judgment litigation regarding the trial judge

During the post-judgment proceedings, the trial judge resigned from the bench due to allegations of drug abuse. Pet. App. 5a. This action gave rise to extensive litigation, which resulted in a successor judge hearing the motions for new trial. Pet. App. 5a-6a. The Tennessee Supreme Court concluded that the original trial judge's out-of-court misconduct was not structural error unless there was a showing or indication in the record that the misconduct affected the trial proceedings. *State v. Cobbins*, No. E2012-00448-SC-R10-DD at 3 (Tenn. May 24, 2012) (order). The Court further held:

> [T]he successor trial judge, after extensively reviewing the record, listening to a recording of one of defendant's testimony, and reviewing all of the physical evidence, stated that he "[could not] find in any way that the trial court was in any way impaired or not capable of discharging professional responsibilities that were required of him as trial judge in this case. Couldn't find it at all." Later, at a hearing on December 1, 2011, the successor judge reaffirmed this finding when he stated, "I can't point to any part of the transcript and say, as I'm reading this, he's drunk. He's intoxicated. I can't do that."

Id. Davidson's trial counsel agreed. R. VI, 48; VII, 100; VIII, 232, 233. Lead counsel later testified, "I—I did not see any evidence of impairment [by the original trial judge] during the trial, or we would have tried to address it." R. VIII, 232. "I just did not see any evidence of impairment." R. VIII, 233. Another lawyer seconded that opinion: "[N]othing in this trial to me indicated that [the trial judge] was unduly under the influence of anything while we were trying it." R. VI, 48. A third member of the defense team concurred. R. VII, 100.

V. Direct review

The convictions and judgments were affirmed on direct appeal. *Davidson*, 509 S.W.3d at 171. Notably, the court held that "[b]ased on this evidence [presented at trial], a reasonable jury could have easily concluded that any one or all four aggravating circumstances outweighed the mitigating circumstances presented by Mr. Davidson." *Id.* at 223. The court also held that buttons

worn by spectators in the gallery presented no constitutional infirmity. *Id.* at 197.[7] This Court denied review of the decision. *Davidson*, 138 S. Ct. at 105.

VI. Post-conviction review

Davidson filed a post-conviction petition in which he alleged, among other things, that his counsel were ineffective for not seeking an out-of-county venire due to the pre-trial publicity. Pet. App. 7a-17a. He presented evidence that Knoxville media mentioned the Newsom and Christian cases 3,111 times on television between January 2007 and October 2009. Pet. App. 14a. The cases, he averred, were mentioned 842 times on news broadcasts in Knoxville between January 2007 and March 2008, many more times than occurred in other Tennessee cities. Pet. App. 14a. Davidson presented a report that an estimated three million viewers watched news reports of Boyd's federal trial. Pet. App. 14a. And 478 mentions of Cobbins' trial in local media, Davidson contended, similarly reached three million viewers in the Knoxville area, even though there were only 430,000 people total in Knox County. Pet. App. 13a, 14a.

The Knoxville news media allegedly noted 76 times that Davidson was purported to be the ringleader of the murders. Pet. App. 15a. Knoxville news stations also allegedly reported 53 times on testimony from Boyd's and Cobbins' trials, or their statements to police, that presented Davidson in a negative light. Pet. App. 15a. Davidson presented evidence that during 37 broadcasts, Knoxville news stations issued stories in which the victims' families expressed their frustration over Cobbins' sentence. Pet. App. 15a. Davidson contended that an estimated 12 million viewers saw an estimated 300 broadcasts about the murders and the subsequent trials, though, as noted, Knox County contained less than half a million residents. Pet. App. 13a, 15a.

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[7] Davidson contends that the audience violated the trial court's instructions regarding wearing buttons. Pet. 27. The Tennessee Supreme Court found otherwise. *Davidson*, 509 S.W.3d at 197.

The local Knoxville paper also ran a story on Cobbins' sentence and the feelings of the victims' families about it. Pet. App. 15a. In another article, Cobbins' counsel was noted to have described Davidson as the mastermind of the operation. Pet. App. 15a. The various defendants' statements to police were allegedly accessible from the newspaper's website. Pet. App. 15a.

Davidson's witness acknowledged that the news reports could have been viewed by people from all over the world. Pet. App. 16a. She also acknowledged that the media coverage declined from January 2007 until the beginning of Davidson's trial, though there were ebbs and flows to the coverage. Pet. App. 16a. All witnesses agreed, however, that the coverage was, in general, extensive. Pet. App. 7a, 10a.

Regarding the courtroom atmosphere, the trial court kept tight control with extra, plain-clothed security. R. VIII, 87, 95, 100; VIII, 233. Davidson's counsel testified that the trial was not a "circus," though there was tension in the air. Pet. App. 16a. Some audience members wore buttons commemorating the victims, and at times there were audible reactions to the evidence from the gallery. Pet. 10a.

The post-conviction court denied relief. Pet. App 6a. Though the court found trial counsel to be deficient for not requesting an out-of-county venire, the court declined to find prejudice, presumed or otherwise. R. IV, 590; V, 591-605. In particular, the post-conviction court ruled that the trial judge's aggressive measures to root out potentially biased individuals from the jury pool negated any suggestion of prejudice. *Id.* The court reached this conclusion after considering the *Skilling* factors in the prejudice analysis. *Id.*

VII. Post-conviction appeal

The Tennessee Court of Criminal Appeals affirmed the judgments of the lower court. Pet. App. 1a. While agreeing that Davidson's counsel should have sought an out-of-county venire, the

appellate court also concluded that Davidson had not demonstrated *Strickland* prejudice in the face of the trial court's extensive procedures to ensure he received a fair trial with an unbiased jury. Pet. App. 53a-66a. The court further determined that the ineffective-assistance claim did not fit into the narrow category of cases from *Cronic* in which prejudice may be presumed. Pet. App. 64a. In particular, the court held: "The record reflects that trial counsel clearly engaged in a hard-fought defense for the Petitioner. Thus, the Petitioner's reliance on *Cronic* is misplaced, and the *Strickland* standard controls." Pet. App. 64a. To affirm, the court carefully considered *Skilling*. Pet. App. 64a-66a. The court also found the freestanding claim of juror bias to be waived. Pet. App. 66a.

REASONS FOR DENYING THE PETITION

I. The Court Should Deny Davidson's Petition Because He Cites No Decision Applying His Novel Application of *Cronic*'s Presumptive Prejudice to Ineffective-Assistance Claims Regarding Pre-Trial Publicity, Much Less a Conflict of Authority on the Subject.

Davidson seeks, *contra Strickland*, to have deficiency engender presumptive, irrebuttable prejudice requiring a new trial. Pet. 34-39. Tellingly, he cites no law in which a court has imposed this standard for an ineffective-assistance claim regarding pre-trial publicity, much less any conflicting authority worthy of this Court's review. *Id.* Thus, his petition does not present a question worthy of this Court's review. *See* Sup. Ct. R. 10(b), (c).

Davidson invokes *United States v. Cronic*, 466 U.S. 648 (1984), to support his argument that presumed, irrebuttable should apply. Pet. 38. But *Cronic* and its progeny concerned very specific sets of circumstances, none of which apply here:

> (1) the accused was denied the presence of counsel at a critical stage of the trial proceedings;
>
> (2) counsel entirely failed to subject the prosecution's case to meaningful adversarial testing; or
>
> (3) situations in which the likelihood that any lawyer could provide effective assistance are so small that a presumption of prejudice is appropriate without inquiry into the actual conduct at trial.

Cronic, 466 U.S. at 659-60. The Tennessee Court of Criminal Appeals properly rejected this contention that *Cronic* controls because Davidson's trial counsel diligently and assiduously represented him both during jury selection and at trial. Pet. App. 64a. There was no denial of counsel at a critical stage, no failure to subject the prosecution's case to meaningful adversarial testing, and no situation in which effective assistance was virtually impossible. Davidson's petition is without merit.

Much of the other cited case law, moreover, does not meaningfully advance his argument or even contradicts it. For example, he relies on *Sullivan v. Louisiana*, 508 US. 275, 281 (1993), for the proposition that the right to an unbiased jury is structural. Pet. 36. *Sullivan* regarded the effects of an incorrect jury instruction on reasonable doubt, not allegations of juror bias, much less ineffective assistance for failing to seek a change of venue or an out-of-county venire. *Sullivan*, 508 U.S. at 276. *Krogman v. State*, 914 NW.2d 293 (Iowa 2018), regarded ineffective assistance for failing to contest a pre-trial asset-seizure order that led to a denial of bail, among other hardships. *Id.* at 308-09; Pet. 38. As Davidson notes, *Quintero v. Bell*, 368 F.3d 892 (6th Cir. 2012), regarded counsel's failure to object to jurors who had also sat on the co-defendants' jury and convicted them. Pet. 38. No juror did so here, and Davidson has not claimed that his trial counsel was deficient for failing to object to the presence of any particular juror who rendered his verdicts.

Davidson also relies at his peril on *Meadows v. Lind*, 996 F.3d 1067 (10th Cir. 2021), in which the Tenth Circuit *affirmed* the denial of relief on an ineffective-assistance claim regarding counsel's performance during voir dire because the petitioner had failed to show actual prejudice. *Id.* at 1071, 1081; Pet. 36. Similarly, he relies upon *Smith v. State*, 357 S.W.3d 322, 347 (Tenn. 2011), in which the Tennessee Supreme Court found deficiency for counsel's failure to question prospective jurors about their experiences as crime victims but found no actual prejudice. *Id.* at 348; Pet. 35. Despite that petitioner's argument to the contrary, the court found, "[The petitioner] is required to prove actual bias." *Smith*, 357 S.W.3d at 348. The court would only presume bias if a juror showed willful concealment of possible bias or willful failure to disclose information that would call into question the juror's bias. *Id.* No such allegations are present here.

II. The Court Should Deny Review Because Davidson's Reasoning Conflicts with the Court's More Recent Decisions, as Well as the Holdings of Multiple Circuit Courts of Appeals, Regarding Freestanding Publicity Claims.

And Davidson's reasoning—it is too difficult to measure prejudice to burden a petitioner with proving it—conflicts with *Skilling*, among other cases, regarding freestanding publicity claims. Unlike some of this Court's earlier decisions, *Skilling* paused to determine whether the accused had suffered actual prejudice from pre-trial publicity. *Skilling*, 561 U.S. at 385-99. In particular, *Skilling* examined in depth the trial court's jury-screening measures, including jury questionnaires, voir dire, and jury instructions, to conclude that no actual prejudice was present. *Id.*

In *Mu'Min v. Virginia*, this Court noted that were pretrial publicity to engender a wave of public passion in connection with a defendant's trial, "the Due Process Clause of the Fourteenth Amendment might well have required more extensive examination of potential jurors than it undertook here." 500 U.S. 415, 429 (1991). That is, reviewing courts may look to jury-screening measures to determine whether due process was satisfied despite extensive negative pre-trial publicity.[8] *Mu'Min* did just that. *Id.* at 431-32. And that analysis of the trial court's jury-selection measures is precisely what both the post-conviction court and the Tennessee Court of Criminal Appeals conducted. Pet. App. 59a, 61a-65a.

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[8] *Mu'Min*'s conclusion had roots in Justice Blackmun's concurrence in *Groppi v. Wisconsin*, 400 U.S. 505, 510-11 (1971), in which Justice Blackmun noted that "[t]he record before us leaves much to be desired . . .. It contains no transcript of the voir dire, and thus there is no way in which we or anyone else can evaluate from the voir dire the presence, or possible presence, of actual prejudice in any member of the jury panel." Notably, the current record suffers from no such deficiency as thousands of pages of jury questionnaires and voir dire transcripts were reviewed and considered by the state courts.

Most recently, this Court focused on a district court's extensive measures to root out bias from pre-trial media exposure in the Boston Marathon Bomber capital trial in Boston and held that there was no error in jury selection. *United States v. Tsarnaev*, 142 S. Ct. 1024, 1035 (2022).[9] If the trial court can conduct measures to prevent prejudice and reviewing courts can determine whether those measures sufficed to weed out potential juror bias, then prejudice is ascertainable. If prejudice is ascertainable, it is also provable, and *Strickland*'s requirement that a claimant prove prejudice should remain in full force and effect for ineffective-assistance claims regarding pre-trial publicity.

Multiple circuit court decisions also belie Davidson's argument that ineffective-assistance claims regarding pre-trial publicity are structural in nature. After *Skilling*, the Fifth Circuit Court of Appeals concluded that a presumption of prejudice under *Skilling* can be rebutted. *United States v. Wilcox*, 631 F.3d 740, 749 (5th Cir. 2011), *cert. denied* 131 S. Ct. 2921 (2011). The Eleventh Circuit is in agreement: "Once the defendant puts forth evidence of pervasive prejudice against him, the government can rebut any presumption of juror prejudice by demonstrating that the district court's careful and through voir dire . . . ensured that the defendant received a fair trial by an impartial jury." *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006). If prejudice can be rebutted, it is not structural.

III. This Case Presents a Poor Vehicle to Explore Davidson's Prejudice Proposition Because His Argument Depends Upon an Alleged Misapplication of *Skilling*.

Davidson spends the bulk of his petition extolling the merits of his underlying *Skilling* claim that prejudice should be presumed. Pet. 6-33. The state post-conviction court, however, applied *Skilling* to conclude that there was no prejudice, presumed or otherwise. Pet. App. 57a-

[9] Notably, this decision reversed *United States v. Tsarnaev*, 968 F.3d 242 (1st Cir. 2020), upon which Davidson relies in his petition. *Tsarnaev*, 142 S. Ct. at 1030, 1041; Pet. 21, 24.

59a; R. V, 594-97. That is, under his analysis and for his ineffective-assistance claim to be meritorious, he must show that the post-conviction court misapplied *Skilling* and made erroneous factual findings. But a "petition for writ of certiorari is rarely granted when the asserted error consists of [alleged] erroneous factual findings or misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Court should not veer from that principle here.

Nor should the Court be tempted to do so. "A presumption of prejudice, our decisions indicate, attends only the extreme case." *Skilling*, 561 U.S. at 381. "[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). "Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*." *Skilling*, 561 U.S. at 381 (emphasis in the original). Even the existence of pre-formed opinions about guilt or innocence due to pre-trial publicity should not necessarily disqualify a prospective juror: "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722–23 (1961).

The cases where it presumed prejudice, this Court emphasized, often involved substantial in-court disruptions. *Skilling*, 561 U.S. 380. In one case, "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom," causing a "carnival atmosphere." *Sheppard v. Maxwell*, 384 U.S. 333, 355, 358 (1966). In another, "reporters and television crews overran the courtroom and 'bomard[ed] . . .the community with the sights and

sounds of' the pretrial hearing." *Skilling*, 561 U.S. at 380 (quoting *Estes v. Texas*, 381 U.S. 532, 536 (1965)).

This was not such a case. Davidson's counsel himself conceded that there was no carnival atmosphere in the courtroom. R. VIII, 233. The trial judge, in fact, provided extra, plain-clothed security to prevent distractions by the media and others. R. VII, 100; VIII, 233. While the courtroom may have been full and the atmosphere might have been tense, the trial court kept order, unlike in *Estes* or *Sheppard.* In contrast to *Rideau*, this was no "kangaroo court." *Rideau v. Louisiana*, 373 U.S. 723, 726. Both the state post-conviction court and the Tennessee Court of Criminal Appeals properly found that there was no carnival-like atmosphere in the courtroom. Pet. App. 63a, 65a.

Further, the *Skilling* factors properly weighed against a presumption of prejudice. *Skilling* focused on:

1. the size and characteristics of the community in which the crime occurred;
2. the existence or absence of blatantly prejudicial information that readers or viewers could not reasonably be expected to shut from sight;
3. the elapse of time between the crimes and the trial; and
4. of prime significance, the presence or absence of acquittals at trial.

Skilling, 561 U.S. at 382-84.

1. The size and characteristics of Knox County weigh against a presumption of prejudice.

The state post-conviction court also properly focused on Knoxville's population of 430,000, as well the city's characteristic as a "university town [with an] education level [] consistent with its urban environment and economic prosperity." Pet. App. 58a. Knoxville was far different from the modest Louisiana parish where Mr. Rideau was tried or the small farming community where Mr. Irvin was convicted. *Skilling*, 561 U.S. at 379; *Irvin*, 366 U.S. at 719.

2. The news coverage, while extensive and often negative, was materially different from the type in *Rideau*.

Additionally, the news coverage, while extensive, sometimes sensationalist, and unflattering to the petitioner, was materially different from the type that concerned this Court in *Rideau*. The Court emphasized in *Skilling* that the contents of Rideau's news coverage was so damaging because it included his video confession to committing the charged crimes. *Skilling*, 561 U.S. at 379; *Rideau*, 373 U.S. at 724-26. That was not the case here: the petitioner gave a *written* statement in which he specifically *denied* killing Newsom or Christian. R. Ex. 87 at 000838, 000431-33, 000442, 000445, 000447. What he did do was blame his co-defendants for the murders. R. Ex. 87 at 000431. Significantly, his averments in this regard were consistent with his defense team's strategy of blaming Cobbins and others for the murders. R. VIII, 222. And the source of the most negative information, the comments sections to the on-line articles, were eventually removed. R. VII, 71.

3. The multi-year gap between the murders and Davidson's trial further weighed against a presumption of prejudice.

Two years, moreover, elapsed between the commission of the offenses and the petitioner's trial, thereby weighing against a presumption of prejudice. The First Circuit Court of Appeals has found that a nearly two-year gap between the offenses—in that case the Boston Marathon bombings—and the trial proceedings weighed against moving the trial to a different venue. *In re Tsarnaev*, 780 F.3d 14, 22 (1st Cir. 2015). The Ninth Circuit and the District of Delaware have found so as well. *Hayes v. Ayers*, 632 F.3d 500, 510 (9th Cir. 2011); *United States v. Matusiewicz*, No. 13-CR-00083, 2015 WL 1069340, at *3 (D. Del. Mar. 10, 2015). While it is true that the media coverage did not go away during the intervening two years between the Newsom and Christian murders and the petitioner's trial, the coverage did not maintain a consistent, high

intensity: it would wax and wane. R. VII, 117-18; IX, 295; Ex. 118. Davidson's own witness conceded that the media interest decreased over time. Pet. App. 16a. The two years' cool-down period, therefore, weighs against any presumption of prejudice here.[10]

4. That Davidson's jury held the State to its burden of proof and acquitted Davidson of three charged offenses weighs heavily against a presumption of prejudice.

Most importantly, the jury was not so incensed by pre-trial publicity that it simply threw the book at Davidson: the jurors carefully weighed the evidence and acquitted him of three of the charged offenses. Direct Appeal R. XIX, 2738-40. If the jurors could not set aside any pre-formed opinions to hold the State to its burden of proof and to restrict their deliberations to the evidence at trial, it would have been easy for them simply to convict him as charged across the board. Significantly, they did not do so: they found Davidson not guilty of three counts of aggravated rape. *Id.* This factor weighs heavily against the presumption of prejudice.

Taken together, this is not one of those rare cases in which the courts presume prejudice—even in a freestanding claim—without showing proof of actual prejudice. The post-conviction court properly refused to find prejudice of any sort. Consequently, Davidson's argument for presumed prejudice falls apart, and his petition presents a poor vehicle to explore whether prejudice should be presumed in an ineffective-assistance publicity claim.

IV. This Case Is a Bad Vehicle for the Court Because Even If Prejudice Were Presumed, It Was Also Rebutted.

Further, even had there been such a presumption, the trial court's extensive jury-screening procedures rebutted that presumption. Each prospective juror was ordered to fill out a

[10] Davidson points to white-supremacist rallies as evidence of pervasive bias against him. Pet. i, 12, 33. But the single Ku Klux Klan rally referenced in the testimony at the state evidentiary hearing occurred in 2007, two years before Davidson's trial. R. VII, 118; VIII, 148-49.

questionnaire with 128 questions, including over 30 questions regarding exposure to information about the Newsom and Christian murders. Pet. App. 61a; R. Exs. 96, 108. The prospective jurors filled out, in total, 6,533 pages of responses. R. Exs. 96, 108. Davidson's jury consultant poured over these responses to rate each potential juror. R. VI, 49; VII, 103. The trial court and the parties engaged in an intensive jury-selection process over nine days with 200 prospective jurors. R. Ex. 108. Defense counsel, a member of the defense team commented, were very methodical during the voir dire process. Pet. App. 13a.

Davidson's jurors testified that, for the most part, their exposure to the media was limited. Ex. 2, 9/21 Tr. at 135, 136, 140, 144, 145, 146; 9/22 Tr. at 20, 95; 9/23 Tr. at 141, 145; 9/25 Tr. at 24, 46; 9/29 Tr. at 87, 227, 228. All the jurors testified that they had no opinion about the case or that they would hold the State to its burden of proof and render verdicts based solely on the evidence presented at trial. R. Ex. 2, 9/21 Tr. at 136, 140; 9/22 Tr. at 21, 96-97, 110, 115; 9/23 Tr. at 141-42, 288; 9/25 Tr. at 26, 47; 9/28 Tr. at 232-33, 241; 9/29 Tr. at 88, 92, 229-30, 256, 259.

Rodney R., the juror who had had more exposure to the media and had formed an opinion of Davidson's guilt, was questioned extensively by the trial court and counsel. R. Ex. 2, 9/28 Tr. at 227-42. At the end, the juror testified that he could think of no reason why Davidson would not want him on the jury. R. Ex. 2, 9/28 Tr. at 241. From the totality of the questioning, the trial court determined that excusal for cause was not warranted, and Davidson's counsel also felt no need to exercise a peremptory challenge on him. R. VI, 51; Ex. 2, 9/28 Tr. at 242; 9/30 Tr. at 103. In fact, defense counsel testified that they would have used a peremptory challenge on any juror they believed should have been excused for cause. R. VI, 51. Significantly, Davidson's attorneys did not exhaust their peremptory challenges. R. Ex. 2, 10/2 Tr.

And during this entire process, the trial court gave extensive instructions on burden of proof, avoiding media exposure, and the perils of believing everything one hears on the news. R. Ex. 2, 9/1 Tr. at 7-26; 9/21 Tr. at 4-13, 171-81; 9/22 Tr. at 3-18; 9/23 Tr. at 6-19; 9/24 Tr. at 14-27; 9/25 Tr. at 6-22; 9/28 Tr. at 12-24, 151-58; 9/29 Tr. at 37-53, 189-205; 9/30 Tr. at 3-16; 10/2 Tr. at 22-28. As jury selection was winding down, the trial judge commented, "We know a lot about these people, and—and you know, we've had the opportunity to examine these people, to talk to them, look them in the eye." R. Ex. 2, 9/30 Tr. at 103. "We—we have excluded anybody who—who, in my judgment, have hinted to us that they can't base their opinion solely on what they hear in this courtroom, and in addition to that, we've questioned very closely about their opinions about punishments." R. Ex. 2, 9/30 Tr. at 103.

"Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influence by a host of factors impossible to capture fully in the record . . . ." *Skilling*, 561 U.S. at 386. This Court in *Skilling* listed measures that would guard against the risk of actual prejudice. *Id.* at 386-89 & n.21. The Tennessee Court of Criminal Appeals commented here: "[E]very single one of those measures was utilized in this case." Pet. App. 65a.

Notably, Davidson received far more extensive jury-selection measures than Mr. Skilling. Skilling complained that the juror voir dire lasted only five hours. *Skilling*, 561 U.S. at 387. The This Court found that those measures were acceptable, particularly because of the 77-item questionnaire the prospective jurors had to fill out. *Id.* Davidson had eight days of individual voir dire plus an additional day of jury selection with peremptory challenges. R. Ex. 2. His prospective

jurors had to fill out a 120-question questionnaire. The inescapable conclusion is that Davidson's jury received thorough screening and was not biased.[11]

Davidson, on the other hand, contends that one may see prejudice simply from the fact that he received a capital sentence while his cohorts did not. Pet. 23-35. The Tennessee Court of Criminal Appeals, however, was right to be wary of such a facile comparison. Pet. App. 66a. Each trial is different, different witnesses may offer testimony, and even the same witnesses may present differently from trial to trial.

Further, it is not difficult to see some material differences between Davidson and his cohorts. It was Davidson who admitted some responsibility for the carjacking by pressuring the others to go out and get money. R. Ex. 87 at 000430. Christian's stolen car was seen parked in front of Davidson's home, not Cobbins's, Boyd's, Thomas's, or Coleman's. *Davidson*, 509 S.W.3d at 171. Davidson was the one seen driving the vehicle afterward. *Id.* at 175. It was Davidson's fingerprints that were found on an item in the stolen car. *Id.* at 179. Davidson, furthermore, admitted to wiping down the vehicle to try to eliminate any incriminating fingerprints. R. Ex. 87 at 000413, 000812.

Christian's body was found inside Davidson's home, not Cobbins's, Boyd's, Thomas's, or Coleman's. *Davidson*, 509 S.W.3d at 173-74. Davidson's fingerprints, not the others', were found on three of the garbage bags that suffocated Ms. Christian. *Id.* at 179. Davidson, not the others, gave Christian's belongings to a girlfriend. *Id.* at 176. Davidson, not the others, was wearing Newsom's shoes. *Id.* at 176-77.

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[11] Davidson argues, on the other hand, that the screenings were tainted because of the trial judge's out-of-court misconduct. Pet. 28-29. But this claim was rejected years ago regarding the trial proceedings as a whole, and there was no evidence that the trial judge was impaired during jury selection. *Cobbins*, No. E2012-00448-SC-R10-DD at 3 (order); R. VI, 48; VII, 100; VIII, 232, 233.

Last, but not least, Davidson's semen, not Boyd's or Thomas's, was found in Ms. Christian's vagina, in her anus, and on her jeans. *Davidson*, 509 S.W.3d at 179.[12] And while Cobbins's semen was found as well, Davidson's counsel acknowledged that Cobbins was in a more favorable position at trial than Davidson. R. VI, 45-46. In addition to the reasons stated above, six members of Cobbins's family testified in support of him at the capital sentencing hearing. *State v. Cobbins*, No. E2013-00476-CCA-R3-CD, 2014 WL 4536564, at *11 (Tenn. Crim. App. Sept. 12, 2014). Though Cobbins and Davidson's were half-brothers, Davidson's family refused to provide him the same support in the sentencing phase of trial. *Id.*; *cf. Davidson*, 2015 WL 1087126, at *4-5; R. VI, 45-46. Differences in the proof in both phases of their trials explain the differing sentences, not the provenance of their juries.

To borrow the words of this Court, Davidson "committed heinous crimes. The Sixth Amendment nonetheless guaranteed him a fair trial before an impartial jury. He received one." *Tsarnaev*, 142 S. Ct. at 1041. The Court should decline his novel invitation to presume prejudice and structural error from his ineffective-assistance claim regarding pre-trial publicity.

[12] Ms. Coleman, a woman, obviously left no semen behind.

CONCLUSION

For the reasons stated, Davidson's petition for writ of certiorari should be denied.

Respectfully submitted,

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