No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

BART JOHNSON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Bart Johnson was indicted for the capital murder of a police officer, the first officer killed in the line of duty in the small, tight-knit community of Pelham, Alabama. The crime, Mr. Johnson's arrest, and the victim's funeral, which drew thousands of mourners and included a procession of hundreds of police cars, were covered extensively on television, on the radio, and in the newspapers. The question presented is:

In a capital case where the death penalty has been imposed, did it violate the Due Process Clause to refuse to change the venue of the trial from a community that was exposed to extensive and prejudicial media coverage of the case?

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PETITION FOR WRIT OF CERTIORARI

Bart Johnson respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Johnson's conviction and death sentence, Johnson v. State, No. CR-10-1606, 2014 WL 2061147 (Ala. Crim. App. May 20, 2014), is not yet reported and is attached at Appendix A, along with that court's order denying rehearing. The order of the Alabama Supreme Court denying Mr. Johnson's petition for a writ of certiorari, Ex parte Johnson, No. 1140770 (Ala. Aug. 21, 2015), is unreported and attached at Appendix B.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed Mr. Johnson's conviction and death sentence on May 20, 2014. Johnson v. State, No. CR-10-1606, 2014 WL 2061147 (Ala. Crim. App. May 20, 2014). On April 10, 2015, the Court of Criminal Appeals denied rehearing. The Alabama Supreme Court denied Mr. Johnson's petition for a writ of certiorari on August 21, 2015. Ex parte Johnson, No. 1140770 (Ala. Aug. 21, 2015). Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

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

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

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

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

STATEMENT OF THE CASE

A. Proceedings Below Related to Venue

This is a case in which the death penalty has been imposed. Mr. Johnson was indicted on two counts of capital murder for shooting police officer Phillip Davis after being stopped for speeding late in the evening of December 3, 2009. (C. 442-43.)[1] During individual voir dire, 102 of the 121 veniremembers asked about pretrial publicity admitted that they had been exposed to information about the case. (R. 90-1075.) About one-fifth of the venire admitted that the pretrial publicity had led them

[1]"C." refers to the clerk's record. "R." refers to the trial record. "SH." refers to the judicial sentencing hearing.

to form the opinion that Mr. Johnson was guilty. Less than half of these veniremembers were removed for cause.

Following voir dire, defense counsel filed a motion for change of venue. (C. 399-404.) The motion argued that the local media coverage, which was "extensive" and described the case in "sensationalized detail," prevented Mr. Johnson from being able to receive a fair trial by a panel of impartial and indifferent jurors as guaranteed by the United States Constitution. (C. 399-401.) The motion noted that one local weekly paper had a story about the case during two-thirds of the weeks between the offense and the trial. (C. 401.) The coverage was constant because the victim was a police officer and because of the ongoing fundraising activities on behalf of the victim's family. (C. 400-01.) The defense argued, "The portrayal of the emotional loss of a fine police officer has obviously been publicized throughout and has provoked the community's hostility against Bart Wayne Johnson." (C. 403.)

At a hearing on the motion, defense counsel presented evidence detailing the extensive media coverage of the case (R. 1105-20), including the airing of over 40 stories by the local ABC affiliate (R. 1112). Counsel argued that Shelby County was a "tight-knit" and "relatively small community" and that "seventy to eighty percent of those people [veniremembers] knew something and/or had opinions of it." (R. 1106-07, 1112.) Counsel emphasized that he was most concerned that "so many of them have a preconceived opinion that he is guilty." (R. 1107-08.) The prosecution acknowledged that "there were a lot of people who said they formed opinions" but argued that "those were questioned and those were overcome." (R. 1121.)

The trial court noted, "I will say this, though, we did have a number of jurors that said that they had heard, seen or read something about it . . . . Each one of them said that they could set aside impressions and opinions." (R. 1105.) The trial court denied the motion, stating, "I don't think it really goes to the level that would require a change." (R. 1123.)

On appeal, defense counsel contended that the trial court's denial of defendant's motion for a change of venue violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. The Alabama Court of Criminal Appeals affirmed Mr. Johnson's conviction and sentence, holding that "[t]he present case does not present an 'extreme' situation in which the presumptive-prejudice standard would be applicable." Johnson v. State, No. CR-10-1606, 2014 WL 2061147, at *43 (Ala. Crim. App. May 20, 2014). Mr. Johnson then sought review in the Alabama Supreme Court on several questions, including whether the Alabama Court of Criminal Appeals's decision finding that the trial court did not error in denying a change of venue violated Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); and Estes v. Texas, 381 U.S. 532 (1965). The Alabama Supreme Court denied Mr. Johnson's petition for a writ of certiorari. Ex parte Johnson, No. 1140770 (Ala. Aug. 21, 2015). Mr. Johnson now respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

B. Factual Background and Trial

On December 3, 2009, Officer Philip Davis was shot and killed after stopping Mr. Johnson for speeding. (C. 442-43.) That evening, Mr. Johnson turned himself in

to the police. (R. 1315, 1320, 2191-92.) He was subsequently charged with capital murder. (C. 32.)

On May 5, 2011, during jury selection, the prosecution used its peremptory challenges to remove six of the eight African American veniremembers. (R. 1245-53.) The resulting jury consisted of 11 white jurors and one African American juror. (R. 1254.) Defense counsel objected to the prosecution's peremptory challenges based on Batson v. Kentucky, 476 U.S. 79 (1986). (R. 1254.) The trial court found that the defense had not established a prima facie case of racial discrimination. (R. 1254.)

At trial, the defense argued that Mr. Johnson was not guilty by reason of mental disease. (See, e.g., R. 1966-67.) The defense's and prosecution's experts disagreed over whether Mr. Johnson suffered from an acute psychotic disorder and whether that impaired his ability to appreciate the wrongfulness of his acts. (Compare R. 1660-65, 1725 with R. 1804, 1870-71.) The jury convicted Mr. Johnson of capital murder. (R. 2047-48.)

The trial court then moved directly into the sentencing hearing. (R. 2048-49.) The prosecution called Officer Peter Fulmer to establish that Mr. Johnson was in custody during the offense. (R. 2061-62.) The prosecution then called Paula Davis, the victim's wife, who testified about her life with Officer Davis and about the impact of his death while showing the jury pictures of her husband and their two children. (R. 2066-86.)

The defense called a longtime friend of Mr. Johnson's, his former teacher, and his former employer, and they testified that Mr. Johnson was an exemplary friend,

student, and employee who volunteered at the local children's hospital, nursing home, and Habitat for Humanity. (R. 2087-97, 2103-07, 2117-30.) Mr. Johnson's uncle testified about sexual abuse in the family and how he had never known Mr. Johnson to be violent. (R. 2097-2103.) Mr. Johnson's father testified that Mr. Johnson came from a broken home and could still be a positive influence on others if sentenced to life without parole. (R. 2111-17.) Mr. Johnson's wife testified about her life with Mr. Johnson and their two young children, who were now six and two years old. (R. 2172-73.)

A defense expert testified about the extensive history of serious mental illness, drug and alcohol abuse, incarceration, and sexual abuse in Mr. Johnson's extended family. (R. 2144-51.) She also testified that Mr. Johnson was a good husband and a good father to his two young children and that he had no history of violence. (R. 2162-64.) The jury recommended that Mr. Johnson be sentenced to death. (R. 2250-51.)

At the judicial sentencing hearing, Mr. Johnson's teacher, father, brother, and wife testified that Mr. Johnson was and continued to be a giving, caring person and a loving husband and father. (SH. 6-9, 10-13, 15-20, 27-31.) They told the trial court how the shooting was completely out of character for Mr. Johnson and how they could not explain it. (SH. 13-14, 24-25, 29.) In closing, defense counsel emphasized that there was no explanation for the offense other than mental illness, given that Mr. Johnson lacked any criminal history and had been a family man and a positive influence in his community. (SH. 32-33, 37-40.) The trial court sentenced Mr. Johnson to death. (SH. 45.)

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER REFUSING TO CHANGE VENUE IN A CAPITAL CASE INVOLVING THE DEATH OF A POLICE OFFICER IN A TIGHT-KNIT COMMUNITY SATURATED BY PREJUDICIAL PRETRIAL PUBLICITY VIOLATES DUE PROCESS.

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). A defendant is denied an impartial jury when the community from which the jury is drawn has been saturated by prejudicial pretrial publicity. See Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (reversing murder conviction because "the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom"); Rideau v. Louisiana, 373 U.S. 723, 727 (1963) (reversing conviction and death sentence because jury drawn from community exposed to defendant's televised confession); Irvin, 366 U.S. at 727-28 (reversing conviction and death sentence where jury drawn from community prejudiced against defendant by pretrial publicity).

An analysis of the extent and prejudicial impact of pretrial publicity must consider the totality of the circumstances, including the size and characteristics of the community, the type of information publicized, and whether the publicity diminished leading up to the trial. See Skilling v. United States, 561 U.S. 358, 382-83 (2010) (finding no presumed prejudice in light of Houston's 4.5 million residents, absence of blatantly prejudicial information, and four years between offense and trial); Rideau, 373 U.S. at 724, 727 (finding failure to change venue violated due process where

defendant's confession broadcast in parish of 150,000 residents). "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." Sheppard, 384 U.S. at 362.

Mr. Johnson was arrested and charged with the murder of Officer Phillip Davis during a traffic stop in Shelby County. (C. 442-43.) The shooting of Officer Davis was a particularly newsworthy event in the county (C. 399-401), which at the time had a population of 195,000.[2] The shooting occurred in Pelham, a town of 21,000 residents, and the victim was the first Pelham officer killed in the line of duty.[3] Pelham and the surrounding county were a "relatively small" and "tight-knit" community. (R. 834, 1112.) The shooting, Mr. Johnson's arrest, and the victim's funeral, which drew thousands of mourners and included a procession of hundreds of police cars (C. 401; R. 561-62, 1109), were covered extensively on television, on the radio, and in the newspapers serving Shelby County (R. 1105-20). The State conceded, and the Alabama Court of Criminal Appeals acknowledged, that the media coverage was "extensive" and "widespread." State's Br. 82; Johnson v. State, No. CR-10-1606, 2014 WL 2061147, at *43 (Ala. Crim. App. May 20, 2014).

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[2]State & County QuickFacts: Shelby County, Alabama, UNITED STATES CENSUS, http://quickfacts.census.gov/qfd/states/01/01117.html.

[3]State & County QuickFacts: Pelham, Alabama, UNITED STATES CENSUS, http://quickfacts.census.gov/qfd/states/01/0158848.html; PHILIP MAHAN DAVIS FOUNDATION, http://officerphilipdavis.com/ (last visited Nov. 17, 2015) (noting that Officer Davis was first officer killed in line of duty in history of Pelham Police Department).

Much of the media coverage focused on the value of the victim, the impact of the crime on the victim's wife and her two small children, and how the community came together to support the victim's family. (C. 400-01; R. 1109-10, 1115.) The local media covered the fact that the victim was named police officer of the year, his name was inscribed on a town monument, and the town council named a street in the his honor. (C. 400.) There were reports about the victim's wife being named an honorary crew chief at a major NASCAR race held in nearby Talladega (C. 400)[4], and about the community raising $200,000 to pay the family's mortgage (C. 400; R. 1113, 1215). Several veniremembers donated to the cause (R. 317, 828, 1215). There was a fundraising luncheon, a "cooking for a cause" fundraiser, a fish fry, a bowling event, a CD sale, and a benefit concert headlined by country music legend Randy Owen. (C. 400-01; R. 833-34.) When the community reached the fundraising goal, it held a mortgage burning ceremony that was covered by the media. (C. 400.) The fact that the victim was a police officer and the subsequent fundraising efforts led to extensive media coverage. A local ABC affiliate, one of several news stations serving Shelby County, aired over 40 stories in the year and a half between the offense and the trial. (C. 401; R. 1112.)

Unlike in Skilling and Murphy v. Florida, 421 U.S. 794 (1975), the media coverage of Mr. Johnson's case did not dissipate over the 17 months between the

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[4] *Slain Pelham Police Officer's Wife Named Honorary Crew Chief for Talladega NASCAR Race*, SHELBY COUNTY REPORTER, April 19, 2010, http://www.shelbycountyreporter.com/2010/04/19/slain-pelham-police-officers-wife-named-honorary-crew-chief-for-talladega-nascar-race/.

offense and the trial. Skilling, 561 U.S. at 383 (finding no violation of due process where "the decibel level of media attention diminished" during four years between offense and trial); Murphy, 421 U.S. at 802 (finding no violation of due process where news coverage tapered off months before trial). Because of the various honors bestowed upon the victim and the ongoing fundraising for the victim's family, the publicity was constant up to and during the trial. (C. 400-01.) For instance, one local weekly paper had a story about the case during two-thirds of the weeks between the offense and the trial. (C. 401.) The week before Mr. Johnson's trial, Cam Ward, who represented the community in the Alabama Senate and who was part of the venire at Mr. Johnson's trial, proposed a legislative resolution to pay tribute to the victim. (R. 39, 1119.)[5] The Alabama legislature adopted the resolution and renamed a section of Interstate 65 in Shelby County as the Philip M. Davis Memorial Highway.[6]

Mr. Johnson's jury was drawn from a relatively small, tight-knit community that had banded together to honor their beloved officer and to support his family, all while being inundated with media coverage of the case. (C. 400-01; R. 317, 828, 833-34, 1105-17, 1215.) "Under such circumstances, it is inconceivable to think that petitioner [] received an impartial assessment of his guilt or innocence on the basis of the evidence, and the detached weighing of aggravating and mitigating circumstances

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[5]Martin J. Reed, *Pelham Memorial Marks Fifth Anniversary of Police Officer's Death in Line of Duty*, AL.COM (Dec. 4, 2014, 11:11 AM), http://www.al.com/news/birmingham/index.ssf/2014/12/pelham_memorial_marks_fifth_an.html.

[6]Id.

which the [Alabama] death penalty system contemplates." Coleman v. Kemp, 778 F.2d 1487, 1539 (11th Cir. 1985) (reversing conviction and death sentence based on finding of presumed prejudice due to inflammatory publicity).

The voir dire prior to Mr. Johnson's trial did nothing to rebut the presumption of prejudice from the pretrial publicity. See id. at 1541, 1541 n.25 (analyzing voir dire while at same time questioning whether voir dire can ever rebut presumption of prejudice). During questioning by the trial court, 102 of the 121 veniremembers admitted having been exposed to the pretrial publicity. (R. 90-1075.) The actual number was likely even higher, given that the court's sole question about pretrial publicity was leading. (See, e.g., R. 930-31); see also Coleman, 778 F.2d at 1542 (noting that voir dire was problematic due to leading questions unlikely "to elicit the disclosure of the existence of actual prejudice"). Several veniremembers at first responded to the court's leading question in the negative, saying that they did not know anything about the case, and then later revealed that they had read newspaper articles and had seen coverage of the case on television. (See, e.g., 707, 711.)

Despite the court's single leading question about media exposure and the lack of follow-up questions, several veniremembers alluded to the extent of the pretrial publicity. (R. 92 ("Absolutely. Last night as a matter of fact. . . I was actually at a bunco group with some friends of mine. I stayed later and the news came on. I was standing there and a friend of mine said, oh, you know, that's going on -- and I hadn't told anybody that I was in a jury. And she went on to say, you know, my husband is best friends with Pelham policemen and went on for twenty minutes about the whole

thing while I was sitting there."); 241 ("I mean, if you watched TV any during the time, you heard something."); 317 ("I was very interested in it when it happened and I do remember it quite well, the police officer having young children."); 357 ("It was all over the news, radio or whatever."); 404 ("It was all over the paper and on television . . . ."); 523-24 ("Just the general, you know, what's been on the news lately."); 561-62 ("I videotaped the funeral procession . . . and counted all two hundred police cars or whatever that went by."); 620 ("Well, I do live in Pelham and read the newspaper every day, so I've seen quite a few things in the newspaper about the case. I have several friends in the community and, of course, we discussed it because it was one of our officers."); 663 ("There was a big article in the Birmingham News yesterday, I believe it was."); 808 ("It was big news."); 849-50 ("Just the newspaper and news clippings and being on local news and just hearsay from people around, you know, work. . . . It did get -- stories get passed around and we discussed it."); 1007 ("So, it was a hot topic of conversation initially following the events. Lots of opinions were expressed throughout the office. It was definitely discussed.").) Six veniremembers actually donated money to the fundraisers for the victim's family (R. 317, 828, 1215), and 20 others admitted that the pretrial publicity led them to form the opinion that Mr. Johnson was guilty (R. 96-97, 259-60, 317-19, 454, 476, 526-27, 602-03, 624-25, 659-60, 678, 695-96, 716, 732, 748-49, 815-16, 855-56, 869, 897, 940-41, 979.) Of these 20 veniremembers, less than half were struck for cause. (R. 457-58, 480-81, 608-10, 627-28, 735, 750-51, 817-18, 863-65, 874, 898-99, 946-47, 982-83.)

Midway through voir dire, the trial court noted:

> I've seen that we have a number of people that know something about the case and a number of people have either formed some opinion or whatever, but they said they could set aside their opinion and reach a verdict based on the evidence presented in the courtroom.

(R. 480). As this Court noted in Irvin, "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." 366 U.S. at 727; see also id. at 728 ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father."); Coleman, 778 F.2d at 1543 ("[W]e are satisfied that the conclusory protestations of impartiality in the voir dire are not sufficient to rebut the presumption of prejudice."). Rather than rebutting the presumption of prejudice from pretrial publicity, the voir dire in this case further highlighted the need for a change of venue. See Sheppard, 384 U.S. at 362 (reversing conviction where some jurors responded to questioning and admitted hearing of prejudicial pretrial publicity); see also id. at 351 ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." (quoting Patterson v. Colorado ex rel. Attorney General of Colo., 205 U.S. 454, 462 (1907))).

This Court has repeatedly recognized that "[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process." Morgan v. Illinois, 504 U.S. 719, 727 (1992) (quoting Irvin, 366 U.S. at 722); Groppi v. Wisconsin, 400 U.S.

505, 509 (1971) (same); Irvin, 366 U.S. at 722; see also Estes v. Texas, 381 U.S. 532, 543 (1965) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness." (quoting In re Murchison, 349 U.S. 133 (1955))). While this Court has set a high bar for demonstrating that a community cannot provide a fair hearing, see Skilling, 561 U.S. at 381 ("only the extreme case"), the Alabama appellate courts have set the bar so high that it is unlikely to ever be met and, as a result, defendants in high-profile cases are being deprived of the constitutional protections of a fair trial and due process. See Johnson, 2014 WL 2061147, at *43 ("The present case does not present an 'extreme' situation in which the presumptive-prejudice standard would be applicable."). As Alabama Supreme Court Justice Glenn Murdock recently recognized in another capital case:

> [I]t is hard to imagine a case involving more extensive and more prejudicial publicity or a case that would more readily warrant a conclusion of presumed prejudice. . . . I recognize that we have witnessed significant changes in news and communication technologies in recent years; however, the fundamental and well established constitutional principles at stake have not changed. With all due respect, I fear that if these principles are not to be allowed operative effect in a case such as this one, then they are left with little or no meaningful field of operation.

Ex parte Luong, No. 1121097, 2014 WL 2139112, at *31 (Ala. May 23, 2014) (Murdock, J., dissenting). This Court should grant a writ of certiorari to clarify that due process and an impartial jury are actual rights guaranteed by the Constitution, and that they are especially critical in capital cases, in order to prevent these rights from becoming empty promises in the State of Alabama. See Irvin, 366 U.S. at 728 ("With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere

undisturbed by so huge a wave of public passion . . . .").

CONCLUSION

For the foregoing reasons, Mr. Johnson prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,

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Appendix A

Appendix B