

No.

In the Supreme Court of the United States

VARSHA MAHENDER SABHNANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a presumption of jury prejudice arises when pervasive pre-trial publicity is “vivid” and “unforgettable,” the trial “swiftly follow[s]” the defendant’s arrest, and the defendant is found guilty on all counts, *Skilling v. United States*, 130 S. Ct. 2896, 2916 (2010), and, if so, whether a presumption of jury prejudice is irrebuttable.

RULE 14.1(b) STATEMENT

Petitioner is Varsha Mahender Sabhnani, a defendant-appellant below. Mahender Murlidhar Sabhnani was also a defendant-appellant below.

Respondent is the United States of America, the appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Varsha Mahender Sabhnani, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-86a) is reported at 599 F.3d 215. The memorandum and order of the district court denying petitioner's motion for a change of venue (App., *infra*, 87a-96a) is unreported but is available at 2007 WL 2769487.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2010. A timely petition for rehearing was denied on May 12, 2010. App., *infra*, 97a. On July 22, 2010, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including October 11, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall *** be deprived of life, liberty, or property, without due process of law ***."

Rule 21(a) of the Federal Rules of Criminal Procedure provides: "Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists

in the transferring district that the defendant cannot obtain a fair and impartial trial there.”

STATEMENT

Petitioner Varsha Mahender Sabhnani and her husband, Mahender Murlidhar Sabhnani, were charged with federal offenses relating to alleged mistreatment of two domestic workers in their home. During the five months between their arrests and trial, the local media reported on the case relentlessly, in the most inflammatory and sensational terms imaginable. The thrust of the coverage was that petitioner and her husband were “millionaire slaveholders” and that petitioner had committed “monstrous” acts of “torture” and brutality.

The Sabhnanis moved for a change of venue, arguing that the pre-trial publicity prevented them from receiving a fair trial. The district court denied the motion. A jury found both defendants guilty on all counts, and the court of appeals affirmed. In approving the district court’s denial of a change of venue, the court of appeals refused to apply a presumption of jury prejudice, as this Court has done on a number of occasions.

Three months after the court of appeals’ decision, this Court decided *Skilling v. United States*, 130 S. Ct. 2896 (2010). *Skilling* makes clear that further review is warranted in this case, for two related reasons. First, *Skilling* clarifies the circumstances in which a presumption of jury prejudice is warranted, and those circumstances are present here. Second, *Skilling* left unresolved the question whether the presumption of prejudice is irrebuttable (the Court having concluded that no presumption arose in that case), and that question can and should be resolved

here (where the presumption does arise). At a minimum, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Skilling*, a highly relevant decision of which the court of appeals did not have the benefit at the time it issued its opinion.

A. Proceedings In The District Court

1. The charges

Petitioner and her husband were charged in a 12-count superseding indictment with forced labor, in violation of 18 U.S.C. § 1589(a); harboring aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii); holding a person in a condition of peonage, in violation of 18 U.S.C. § 1581(a); document servitude, in violation of 18 U.S.C. § 1592(a); and conspiracy to commit these offenses. The government's theory was that the defendants held two Indonesian domestic workers—Samirah and Enung—in a state of servitude in their Long Island, New York home, where they required the workers to labor for long hours and low wages and subjected them to inhumane treatment. The case was prosecuted in the Eastern District of New York, in Central Islip, Long Island. App., *infra*, 2a-4a, 16a-18a, 98a, 111a, 263a, 312a, 317a.

2. The pre-trial publicity

From the time of the Sabhnanis' arrest in May 2007 through their trial in October 2007, the case was the subject of unrelenting media coverage, fueled in large part by the prosecution's highly charged rhetoric.

a. At their initial appearance on May 15, 2007, the day after the arrests, the government described the allegations against the Sabhnanis in unusually

vivid and inflammatory terms. According to the prosecutor:

[T]his particular crime is a crime of *incomprehensible brutality and violence and inhumanity*. The conduct that these Defendants engaged in was *absolutely monstrous*.

It truly is a case of *modern day slavery*. And I know that typically when one hears the word slavery, there are images evoked of ancient pharaohs in Egypt or the Romans and the slaves that they kept, or even Africans who were brought over to the New World and to America and enslaved here.

Nobody would ever think that right here on Long Island, human beings were being brought in from another country, being held and forced to perform domestic labor through threats of *violence, physical torture and restraint*.

App., *infra*, 99a (emphasis added). The prosecutor used similar language in describing how petitioner was alleged to have treated the domestic workers (at that time referred to as “Jane Doe 1” and “Jane Doe 2”):

[I]t mainly was Mrs. Sabhnani who administered the beatings to Jane Doe #1. And we’re not talking about a mere beating with a slipper or a slap of the hand.

This Defendant – Mrs. Sabhnani – *systematically, repeatedly, viciously attacked* Jane Doe #1. She beat her with her fists, she beat her with wooden rolling pins, she beat her

with wooden brooms, she cut her with a knife, she poured scalding hot water on her.

And then she continued the *torture* by forcing the victim on several occasions to take repeated showers – shower after shower after shower – for what apparent reason, Judge – some type of punishment in the Defendant’s *twisted mind*.

Id. at 101a (emphasis added). In support of these accusations, the government submitted graphic photos of the alleged victims and their injuries. Dist. Ct. Dkt. No. 49, Ex. 3.

At the same hearing, the prosecutor made gratuitous references to the Sabhnanis’ wealth. After asserting that they had made Enung and Samirah “sleep on mats on the kitchen floor,” for example, the prosecutor sarcastically remarked that the Sabhnanis “had two kitchens, of course, so I guess it was okay for them to make the victims sleep on one of the floors.” App., *infra*, 102a. The prosecutor described the Sabhnanis’ home as a “beautiful mansion on one of the most exclusive areas of Long Island.” *Id.* at 100a. And she repeatedly stated that the Sabhnanis had “vast sums of money” and “vast resources.” *Id.* at 100a, 103a.

The local media seized upon this combination of sensational allegations and class bias. On the very day of the Sabhnanis’ initial appearance, the *New York Daily News* ran the photos the government had filed in court with an article titled “L.I. Slavery Evidence.” App., *infra*, 118a, 185a. The photos’ captions echoed the government’s accusations:

- A photo of Enung lying on a mat was captioned “bed for one of two Indonesian women

allegedly kept as slaves by Mahender and Varsha Sabhnani.” *Id.* at 185a.

- Photos of Samirah’s back and a drawer with a rolling pin were captioned “Varsha Sabhnani allegedly beat one of the women *** with a knife, rolling pin and broomstick.” *Ibid.*
- A photo of an arm hooked up to an intravenous line was captioned “If *** Samirah[] was considered ‘disobedient,’ she was scalded with hot water or forced to eat hot peppers.” *Ibid.*
- A photo of a woman kneeling in a closet was captioned “[Enung] was made to sleep in a closet in her bedroom.” *Ibid.*

The next day, the *New York Post* ran an article titled “Cruel L.I. Slave Masters,” which repeated almost point-for-point the government’s view of the case. The *Post* described the Sabhnanis as a “‘monstrous’ millionaire couple”—“perfume moguls from the mega-rich community of Muttontown”—who “kept two Indonesian women as slaves for five years in their tony estate-turned house of horrors.” App., *infra*, 120a. Quoting the prosecutor, the *Post* characterized the case as one of “modern-day slavery,” which involved “incomprehensible . . . inhumanity.” *Id.* at 120a-121a. The *Post* portrayed petitioner as the “main torturer who doled out the horrific punishment,” *id.* at 121a, and highlighted the lurid details of the conduct alleged by the government:

- Samirah was “beaten with brooms and rolling pins, repeatedly sliced on the ears with a paring knife, starved and forced to sleep on the kitchen floor.” *Id.* at 120a-121a.

- Petitioner’s “cruelty” included “forcing Samirah to take as many as 30 ice-cold showers in a row, run up and down a flight of stairs 150 times as fast as she could[,] and gulp down at least 25 ‘extremely hot chili peppers at one time.’” *Id.* at 121a.
- Enung “was once forced to *** take as many as 10 icy showers in a row for ‘perceived wrongdoing.’” *Id.* at 123a.
- Samirah had “highly visible scars that appear to be permanent over much of her body” and “deep, open knife wounds behind her ears.” *Id.* at 122a.
- Samirah and Enung were “starved to the point that they began hiding food.” *Ibid.*

b. At a bail hearing on May 17, 2007, the prosecutor made additional claims. She asserted that petitioner had struck Samirah “on the top of the head with a closed fist while *** wearing a rather large ring,” hit her “in the face with a metal spoon,” “forced [her] to take *** cold baths,” starved her, and deprived her of sleep. App., *infra*, 112a-113a. The prosecutor also implied that petitioner had inflicted “bizarre types of punishments and emotional torture and psychological torture” out of religious animus. *Id.* at 115a. In that connection, the prosecutor stated that petitioner had told Samirah that Samirah’s “god, Allah is, *** a four letter word for fecal matter” and that petitioner’s “god is better” because he “gave [petitioner] good fortune and four good kids.” *Ibid.*

The *New York Post* picked up on these developments in an article published the same day. Invoking the fictional villain, the article stated that petitioner had “inflicted ‘Cruella De Vil’ punishment” on

Samirah. App., *infra*, 130a. The “Cruella” label stuck. The next day, the *Post* ran an article titled “\$3.5M Bail For Cruella And Hubby.” *Id.* at 132a. It followed that one with a May 19 article titled “Cruella Gals Have Faith,” *id.* at 133a; a May 31 article describing Samirah as “a servant to Varsha ‘Cruella’ Sabhnani,” *id.* at 138a; and a June 7 article titled “Cruella Death Threats,” *id.* at 146a.

On May 20, 2007, the *New York Times* ran an article titled “Slaves of Long Island,” which characterized the case as a “horrifying story of exploitation and cruelty” and detailed the “sickening” abuses alleged by the government. App., *infra*, 134a. In a separate article published the same day, the *Times* opined that the “exploitation and cruelty” that petitioner had allegedly visited upon Samirah and Enung established the need for a new law “crack[ing] down on the trafficking of people for sex and labor.” *Id.* at 135a.

On May 31, 2007, in an article titled “Slave ‘Slay Threat,’” the *New York Post* reported on the government’s new allegation that petitioner’s mother had tried to bribe Samirah’s son-in-law in Indonesia. App., *infra*, 138a. According to the government, the son-in-law was offered \$28,000 to ensure that Samirah “would leave the United States and not cooperate with the prosecution.” *Id.* at 138a-139a. The article went on to say that, despite the “horrific charges of ‘inhumane’ brutality,” the Sabhnanis had been permitted to “await trial in their luxurious estate,” which “feature[d] an in-ground lagoon pool with waterfall and built-in stainless steel barbecue area.” *Id.* at 139a. The *New York Times* also reported on the alleged bribe. *Id.* at 137a.

c. Thereafter, in the months leading up to the trial, articles on the case continued to appear regularly. The following is merely a sampling of the media coverage:

- On June 4, 2007, the Long Island newspaper *Newsday* published an article titled “Judge rips detention plan in slavery case.” App., *infra*, 141a-143a. Additional *Newsday* articles followed on June 6 (“New plan for couple to do time at home”); June 7 (“No bail yet for couple accused in slave case”); June 9 (“Slavery case couple hire new lawyers”); June 12 (“Judge orders slavery couple held without bail”); June 15 (“Slave case couple asks for judge’s removal” and “Slave’ suspects appeal bail denial”); June 16 (“Slave’ defense knocks judge”); June 26 (“Step toward bail in LI slave case,” “Lawyers: slavery couple a flight risk,” and “Appeal set in slave case”); June 27 (“Ruling calls for bail deal”); June 28 (“Feds: Armed guards should watch accused slaveholders”); July 10 (“Slave’ suspects win bail but release date unclear”); July 11 (“Slave’ suspects: Woman hurt self”); July 13 (“Attorneys call for slave case trial to be moved”); July 14 (“No bail for pair in Muttontown slave case”); July 17 (“Attorney raps subpoenas in slavery case” and “Daughters subpoenaed in slave case”); July 18 (“Lawyer raps daughter’s subpoena in slave case”); July 24 (“Daughters to testify in slavery case”); August 3 (“Once again, bail denied in slavery case”); and August 4 (“Home detention for ‘slave couple’ delayed”). *Id.* at 144a-145a, 148a-151a, 155a-163a, 170a-173a, 176a,

179a-180a, 183a-184a, 235a-238a, 243a-257a, 260a-262a.

- Articles on the case appeared in the Associated Press wire service on June 11 (“Judge rejects bail application in Long Island slavery case”); June 26 (“Appeals court could allow accused LI slaveholders free on bail,” “Court: Bail for Couple Accused of Slaves,” and “Millionaire slaveholders may be freed on bail”); June 27 (“Slavery case couple to be granted bail”); and June 28 (“Prosecutors: Bail should mean armed guards in LI slave case”). *Id.* at 152a-154a, 164a-167a, 174a-175a, 177a-178a, 181a-182a. Many of these articles also appeared in *Newsday*.
- The *New York Daily News* and the *New York Times* ran articles on July 10 and July 13, *id.* at 232a-234a, 241a-244a, and the *New York Post* continued its particularly virulent coverage, see *id.* at 239a-240a (July 13 article titled “‘Slave’ labor of love”); *id.* at 258a-259a (July 31 article titled “‘Indonesian slave’ was nuts: Long Island family”).

Although television and radio coverage is less easily documented, online reports indicated that it was comparable in nature and frequency to the print media’s coverage of the case. On May 17, 2007, for example, WABC-TV Eyewitness News reported: “Bail set for LI couple accused of keeping slaves; Police: Worst Case they’ve ever seen.” *App.*, *infra*, 194a, 197a. A week later, on May 24, WABC-TV announced that the “slavery couple” had been indicted and again quoted the police as saying that it was the “worst case they’ve ever seen.” *Id.* at 194a, 198a-200a. On May 30, June 4, June 11, June 26, and

June 28, there were additional broadcasts on WABC-TV, WCBS-TV, WCBS NewsRadio 880, and 1010 WINS Radio, which again employed the government's "modern-day slavery" slogan and detailed its allegations. *Id.* at 194a-196a.

3. The motion for a change of venue

Invoking the Due Process Clause of the Fifth Amendment and Federal Rule of Criminal Procedure 21(a), which requires a transfer to another district if the defendant "cannot obtain a fair and impartial trial" in the district where the case was brought, the Sabhnanis moved for a change of venue based on the pre-trial publicity described above. App., *infra*, 117a-118a, 218a, 230a. Even after the motion was fully briefed, the sensational media coverage continued unabated.¹

In a memorandum and order dated September 21, 2007, the district court denied the motion. App., *infra*, 87a-96a. The court believed that a change of venue was unwarranted because (a) "the government's statements" that were picked up by the media "were related to the crimes with which defendants are charged" and "[d]efendants' attorneys" themselves placed "their clients in the media spotlight";

¹ See, e.g., Robert E. Kessler, *Muttontown "slave couple" goes home*, NEWSDAY (Aug. 21, 2007); Selim Algar, "*Cruella*" Couple in Home Jail, NEW YORK POST (Aug. 22, 2007); Richard Weir, *Shackles Off L.I. Pair in Slave-Torture Case Allowed Home on \$4.5M Bail*, NEW YORK DAILY NEWS (Aug. 22, 2007); Robert E. Kessler, *Muttontown couple accused of forcing housekeeper to eat vomit*, NEWSDAY (Sept. 19, 2007); *Millionaire Couple Faces New Charges In L.I. Slave Case*, WCBS-TV.com (Sept. 19, 2007); Robert E. Kessler, *New judge named in LI slave case*, NEWSDAY (Sept. 28, 2007).

(b) “the vast majority of media coverage has coincided with the court proceedings” and “amounts to no more than *** the news of the day”; and (c) “thorough voir dire examinations have been used *** to produce unbiased juries, even in high-profile cases.” *Id.* at 93a-95a (internal quotation marks omitted).

4. Jury selection

The jury selection confirmed that, contrary to the district court’s belief, an unbiased jury could *not* be produced in this high-profile case. The strongly negative reactions to the Sabhnanis reflected in the responses on juror questionnaires demonstrated the extent to which the venue had been saturated with unremittingly hostile pre-trial publicity.

Prospective jurors informed the court that they were “shocked”, “angry,” and “repulsed” by what they had heard and read in the press. App., *infra*, 270a, 303a, 304a; see also *id.* at 284a (“unacceptable and awful”); *id.* at 306a (“horrific”). Several said they would have difficulty following the court’s instruction to ignore the media coverage. *Id.* at 271a, 288a, 292a, 299a-300a. Others expressed bias against the Sabhnanis on account of their wealth, *id.* at 274a-275a, 290a, 292a, 303a, or national origin, *id.* at 272a-273a, 287a, 290a, 293a, 306a. An alarming number unequivocally stated their belief that the Sabhnanis were guilty, *id.* at 271a, 274a, 276a, 282a-284a, 286a, 294a-295a, 298a-299a, 302a, 306a, or admitted that they would have trouble remaining fair and impartial, *id.* at 265a, 267a-269a, 271a-277a, 280a-282a, 284a-287a, 290a-292a, 294a-296a, 300a, 304a-305a. One went so far as to say that there was “no way that the [Sabhnanis] could convince her that they [were] innocent.” *Id.* at 268a. Many prospective jurors explicitly linked their per-

ception that the Sabhnanis were guilty to the media coverage of the case. See *id.* at 298a (“as presented in the newspaper the defendants appear to be guilty”); *id.* at 302a (“response to the media exposure assume[d] guilt”); *id.* at 306a (“*Newsday*, the TV and radio” made Sabhnanis “seem guilty to me”).²

As remarkable as these statements were, they likely *understated* the prejudicial impact of the pre-trial publicity. During voir dire, a prospective juror who had been excused sent an e-mail to the court describing what she had learned in the jury-selection process based on her conversations with other members of the jury pool. App., *infra*, 308a-311a. The case had “receiv[ed] a lot of attention,” she said, and everyone on “Long Island[] that is being honest” knew about it. *Id.* at 309a-310a (emphasis omitted). The excused juror expressed “surprise[]” about the “number of jurors *** willing to pretend that they ‘lived in a cave’” in order to serve on the jury and “astonish[ment]” at the “sheer number of people” who were “willing to hide truths, out and out lie, or, at the very least, practice all forms of omission *** in the pursuit of getting onto [the] jury.” *Id.* at 308a-310a (emphasis omitted). She believed that a fair and unbiased jury could not be assembled when people were “lying to get on [the jury] and admitting

² See also App., *infra*, 266a (prospective juror “found what he read in the *Daily News* and the *Post* appalling”); *id.* at 278a (media accounts made Sabhnanis “look bad”); *id.* at 281a (“prior opinion from the media coverage” made it impossible to “remain fair and impartial”); *id.* at 292a (based on “media exposure,” Sabhnanis “don’t seem like nice people”); *id.* at 300a (saw “case on TV” and “thought it was a horrible thing to do to another person”).

to both bias and opinions of guilt while lying in wait to be chosen.” *Id.* at 311a (emphasis omitted).

The Sabhnanis requested that the magistrate judge presiding over jury selection call the e-mail to the attention of the jurors who had already been qualified and invite them to supplement their answers about the extent to which media coverage had affected their views of the case. App., *infra*, 315a-316a, 318a-319a. The magistrate judge refused to take any corrective action. *Id.* at 316a, 319a.

5. The trial

Trial commenced in October 2007 and lasted for seven weeks. App., *infra*, 17a, 21a. Intensive press coverage continued throughout that period. See Pet. C.A. App. 137-236.

The government’s case depended heavily on the testimony of the two alleged victims, Samirah and Enung. App., *infra*, 17a-18a. The defense argued that they should not be believed, because, among other things, (a) visitors to the Sabhnanis’ home had observed Samirah and Enung and noticed nothing unusual; (b) the medical evidence did not support Samirah’s claim that she had been subjected to physical abuse; (c) Samirah believed that petitioner had killed Samirah’s son by casting a spell on him; and (d) Enung wanted to find a witch doctor to cast a spell that caused Mahender Sabhnani to be attracted to her and give her money. *Id.* at 18a, 26a-27a; Pet. C.A. Br. 4-9.

After a little over two days of deliberations, the jury found the Sabhnanis guilty on all counts. The district court sentenced petitioner to 11 years of imprisonment and her husband to 40 months. App., *infra*, 2a, 18a.

B. The Court Of Appeals' Decision

1. The Sabhnanis raised multiple claims on appeal, including, as relevant here, that the pervasive pre-trial publicity required that the case be tried in a different venue. In an opinion issued on March 25, 2010, the court of appeals rejected that claim and all the others, except for one relating to restitution. The court thus vacated the restitution award and remanded for recalculation, but affirmed in all other respects. App., *infra*, 1a-86a.

The court of appeals acknowledged that pre-trial publicity “can so saturate a community (and be so highly prejudicial to the defendants) that courts should in such cases presume a fair trial was impossible.” App., *infra*, 22a. The court concluded, however, that “neither the character of the publicity nor the extent to which potential jurors were either exposed to it or affected by it warrants the conclusion that a presumption or inference of generalized prejudice was appropriate in this case.” *Id.* at 24a. The court instead required “actual evidence that the venire was biased” and determined that “[t]he record *** does not establish” actual prejudice. *Id.* at 22a.

In holding that “the district judge did not abuse his discretion in denying the Sabhnanis’ motion to transfer venue,” App., *infra*, 20a, the Second Circuit relied upon, and approved, the considerations identified by the district court. The court of appeals concluded that “the prosecution’s statements regarding the character of the crimes” that were picked up by the press “were proper in the context in which they were made” and that, in any event, “the press coverage appears to have been driven at least as much by comments of the Sabhnanis’ counsel as by any prosecutor’s statement.” *Ibid.* The court also reasoned

that “most of the press coverage tracked the frequent court proceedings in this case” and that “[c]overage of actual developments in a criminal case generally will not rise to the level of prejudicial publicity that will warrant a venue change.” *Id.* at 21a. Finally, the court believed that “the key to determining the appropriateness of a change of venue is a searching voir dire” and that the voir dire in this case was adequate. *Id.* at 23a.

2. On April 6, 2010, the Sabhnanis filed a petition for rehearing. They requested, among other things, that “the Panel or en banc Court hold this matter pending the [Supreme Court’s] decision in *Skilling* [v. *United States*],” which presented the question of “when excessive adverse publicity mandates a change of venue,” and that the Second Circuit “then rehear [the case] or rehear it en banc.” Petition for Rehearing at 14, *Sabhnani*, 599 F.3d 215 (2d Cir. 2010) (No. 08-3720). On May 12, 2010, the court of appeals denied the petition for rehearing. App., *infra*, 97a. This Court decided *Skilling* on June 24, 2010.

REASONS FOR GRANTING THE PETITION

This case involves the question of “[w]hen *** the publicity attending conduct charged as criminal dim[s] prospects that the trier can judge a case, as due process requires, impartially, unswayed by outside influence.” *Skilling v. United States*, 130 S. Ct. 2896, 2913 (2010). More specifically, the case involves two issues related to the presumption of jury prejudice that arises when “adverse pretrial publicity” is such that “the jurors’ claims that they can be impartial should not be believed.” *Mu’Min v. Virginia*, 500 U.S. 415, 429 (1991) (quoting *Patton v. Yount*, 467 U.S. 1025, 1031 (1984)). In a case of that type,

the defendant need not demonstrate “actual prejudice” from the publicity to be entitled to a trial in a different venue. *Murphy v. Florida*, 421 U.S. 794, 799, 803 (1975).

In *Skilling*, this Court clarified that, under its precedents, a presumption of prejudice arises when pervasive pre-trial publicity is “vivid” and “unforgettable,” the trial “swiftly follow[s]” the defendant’s arrest, and the defendant is found guilty on all counts. 130 S. Ct. at 2916. Those circumstances were not present in *Skilling*, but they are present here, and so the court of appeals’ refusal to apply the presumption conflicts with this Court’s decisions. Certiorari should be granted to bring the Second Circuit into line with this Court’s precedents. See Point A, *infra*.

In *Skilling*, the Court did not decide the specific question on which it had granted certiorari—whether the presumption of jury prejudice can be rebutted—because it determined that the presumption did not arise in that case. But the presumption does arise here, and so the Court should also grant certiorari to decide the question that it had no occasion to reach in *Skilling*. See Point B, *infra*.

At the very least, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Skilling*. The Second Circuit’s decision is inconsistent with the reasoning in *Skilling*, of which the court of appeals did not have the benefit at the time of its decision, and there is a reasonable probability that it would reach a different conclusion if given the opportunity for reconsideration. See Point C, *infra*.

A. The Court Should Grant Certiorari To Decide Whether A Presumption Of Prejudice Arises When Pervasive Pre-Trial Publicity Is Vivid And Unforgettable, The Trial Swiftly Follows The Arrest, And The Defendant Is Found Guilty On All Counts.

This Court has presumed juror prejudice in three cases: *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). See *Murphy*, 421 U.S. at 798. In *Skilling*, the defendant relied on these cases in arguing that juror prejudice should be presumed there as well. See *Skilling*, 130 S. Ct. at 2915. The Court found that reliance misplaced, because there are “[i]mportant differences” between these cases and *Skilling*, which “shares little in common” with them. *Id.* at 2915-2916. The Court identified several characteristics of *Rideau*, *Estes*, and *Sheppard* that led the Court to apply a presumption of prejudice. Those characteristics were all absent in *Skilling*, but—with one partial exception—they are present here.

Skilling’s analysis thus confirms that, if a presumption of juror prejudice was warranted in *Rideau*, *Estes*, and *Sheppard*, it is warranted here as well. *Skilling* also demonstrates that the Second Circuit’s refusal to apply the presumption is inconsistent with these decisions. Certiorari should therefore be granted because the court of appeals “has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Sup. Ct. R. 10(c).

1. *Skilling* makes clear that a presumption of prejudice arises when some combination of the fol-

lowing circumstances are present: the news reports included “blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight”; the defendant’s “trial swiftly followed a widely reported crime”; there was no “large, diverse pool of potential jurors”; and, “of prime significance,” the jury found the defendant guilty on all counts, and thus “the jury’s verdict did not undermine in any way the supposition of juror bias.” *Skilling*, 130 S. Ct. at 2915-2916; see, e.g., *State v. Hayes*, No. CR070241859, 2010 WL 3328076, at *2 (Conn. Super. Ct. July 28, 2010) (“The circumstances under which a ‘presumption of prejudice’ will be inferred by the courts have recently been analyzed in *Skilling v. United States*, *** [which] identifies four relevant factors for judicial consideration ***.”). All but one of those circumstances are undeniably present here.

First, the news stories about petitioner were not merely “not kind.” *Skilling*, 130 S. Ct. at 2916. The government accused petitioner of having committed “absolutely monstrous” acts of “incomprehensible brutality and violence and inhumanity,” including “modern day slavery” and “physical torture,” that the police considered the “worst *** they’ve ever seen.” App., *infra*, 99a, 101a, 103a, 197a. Echoing—often verbatim—that superheated rhetoric, the unrelenting press reports described above purveyed “blatantly prejudicial information” that was “vivid, unforgettable,” “likely imprinted indelibly” in the minds of potential jurors, and “of the type readers or viewers could not reasonably be expected to shut from sight.” *Skilling*, 130 S. Ct. at 2916. Both the offenses with which petitioner was charged—including peonage and forced labor—and the associated allegations of brutality and torture are a world apart from the

bloodless corporate fraud that this Court in *Skilling* deemed insufficiently “memorable and prejudicial” to give rise to a presumption of prejudice. *Ibid.* Like robbery, kidnapping, and murder—the offenses at issue in *Rideau*, see 373 U.S. at 723-724, and *Shepard*, see 384 U.S. at 335-336—they are precisely the sorts of crimes that are likely to evoke an intensely visceral response. See also *Skilling*, 130 S. Ct. at 2922 (“news stories about Enron contained nothing resembling the horrifying information rife in reports about [the] rampage of robberies and murders” at issue in *Irvin v. Dowd*, 366 U.S. 717 (1961), which held that pre-trial publicity had deprived the defendant of a fair trial). Indeed, “enslavement” and “torture” are *more* likely to evoke that response than ordinary crimes of violence.

The risk of juror prejudice was only heightened by the media’s reporting of gruesome details of petitioner’s alleged conduct—even to the point of publishing photographs of Samirah and Enung’s injuries. “[D]etails of the methods that [petitioner] allegedly used to torture [her] victims,” App., *infra*, 19a—beatings inflicted with a rolling pin, broom, and knife; forced consumption of hot peppers; scalding with hot water; forced cold showers; starvation; and sleep deprivation—are precisely the sort of “evidence of the smoking-gun variety” that “invited prejudgment of [petitioner’s] culpability.” *Skilling*, 130 S. Ct. at 2916. Given this “barrage of newspaper headlines, articles, *** and pictures *** unleashed against [petitioner] during the *** months preceding h[er] trial,” the “build-up of prejudice is clear and convincing.” *Irvin*, 366 U.S. at 725.

Second, petitioner’s trial “swiftly followed a widely reported crime.” *Skilling*, 130 S. Ct. at 2916. On-

ly five months elapsed between petitioner's arrest (in May 2007) and the start of trial (in October 2007). App., *infra*, 21a. This case is thus very much like *Sheppard*, in which the trial began approximately three months after the defendant's arrest, see 384 U.S. at 341-342, and very much *unlike* *Skilling*, in which "over four years elapsed between Enron's bankruptcy and Skilling's trial" and the "decibel level of media attention diminished somewhat in the years following Enron's collapse," 130 S. Ct. at 2916. There was no passage of time here that could have made the prejudicial effects of pre-trial publicity dissipate and "helped 'sooth[e] and eras[e]' community prejudice." *Id.* at 2914 n.13 (quoting *Yount*, 467 U.S. at 1034; brackets added by Court). On the contrary, in the months immediately prior to trial, the media kept feeding what the government described as the "interest among the public in this case," App., *infra*, 319a, by continuing to publish sensational articles.

Third, and of "prime significance," the jury handed the government an "overwhelming victory" by finding both petitioner and her husband guilty on all 12 counts of the indictment. *Skilling*, 130 S. Ct. at 2916. Thus, as "[i]n *Rideau*, *Estes*, and *Sheppard*, *** the jury's verdict did not undermine in any way the supposition of juror bias." *Ibid.*³

³ The only one of the four factors identified in *Skilling* that does not clearly favor petitioner does not clearly favor the government either: "the size and characteristics of the community in which the crime occurred." *Skilling*, 130 S. Ct. at 2915. While this case is not like *Rideau*, in which the crime was committed "in a parish of only 150,000 residents," it is also not like *Skilling*, in which the crime was committed in "the fourth most populous city in the Nation." *Ibid.* The alleged crimes occurred in a small suburban community on Long Island, and the trial was

2. In refusing to apply a presumption of prejudice, the court of appeals disregarded the considerations that—as *Skilling* has since made clear—must guide the presumption-of-prejudice inquiry. The court did not consider the “vivid” and “unforgettable” nature of the pre-trial publicity, *Skilling*, 130 S. Ct. at 2916; it simply asserted, conclusorily, that “the character of the publicity” did not warrant a presumption of prejudice, App., *infra*, 24a. The court gave short shrift to the fact that the trial “swiftly followed” the arrests, *Skilling*, 130 S. Ct. at 2916; it acknowledged that the trial commenced only “five months” later, but found it permissible to deny a venue change even when “the press coverage [i]s continuing and prominent,” App., *infra*, 21a (internal quotation marks omitted). And the court entirely ignored the jury’s guilty verdict on all counts, a matter of “prime significance” that resulted in an “overwhelming victory” for the government. *Skilling*, 130 S. Ct. at 2916.

In the end, the Second Circuit rejected a presumption of prejudice with little more than the observation that “[c]ases presenting this scenario are very rare.” App., *infra*, 22a. But that is not a sufficient justification for refusing to apply the presumption. Nor is anything else the court said in its opinion.

held more than 50 miles from the federal courthouses in Manhattan and Brooklyn. In any event, the absence of a “large, diverse pool of potential jurors” cannot be a necessary condition for the presumption of prejudice, since the *Sheppard* case was tried in Cleveland. See *Sheppard v. Maxwell*, 231 F. Supp. 37, 60 (S.D. Ohio 1964), rev’d, 346 F.3d 707 (6th Cir. 1965), rev’d, 384 U.S. 333 (1966).

For example, the court of appeals declined to “find any error in the district court’s determination that *** the press coverage appears to have been driven at least as much by comments of the Sabhnanis’ counsel as by any prosecutor’s statements.” App., *infra*, 20a. As an initial matter, that determination is erroneous, and manifestly so. On the few occasions when defense counsel commented to the press, they typically made a brief statement of fact or simple expression of confidence in the case; their benign remarks, see *id.* at 93a-94a & nn.4-6, 223a-228a, pale in comparison to the government’s over-the-top rhetoric. Whether erroneous or not, moreover, the determination has no legal significance. As this Court explained in *Rideau*, “the question of who originally initiated” the prejudicial pre-trial publicity is “a basically irrelevant detail.” 373 U.S. at 726. Consistent with that view, this Court concluded in *Sheppard* that the trial judge “did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity,” even though the defendant “made many public statements to the press and wrote feature articles asserting his innocence” and thus “many of the prejudicial news items c[ould] be traced to *** the defense.” 384 U.S. at 340, 361, 363.

The Second Circuit also thought it significant that “most of the press coverage tracked the frequent court proceedings in this case.” App., *infra*, 21a. But the court did not explain why articles portraying the Sabhnanis as a “millionaire slave couple,” and petitioner’s actions as “torture,” are any less “vivid” and “unforgettable,” *Skilling*, 130 S. Ct. at 2916, simply because they happen to have been prompted by a proceeding in the case. They self-evidently are not.

Finally, the Second Circuit believed that “the key to determining the appropriateness of a change of venue is a searching voir dire.” App., *infra*, 23a (internal quotation marks omitted). But the whole point of the presumption of prejudice is that “the jurors’ claims that they can be impartial should not be believed.” *Yount*, 467 U.S. at 1031. Accordingly, voir dire either is irrelevant to the presumption-of-prejudice inquiry or, at most, could be relevant only when the government seeks to rebut the presumption. See Point B, *infra*. It has no bearing on whether the presumption arises in the first place.

3. If anything, a presumption of prejudice may be even more warranted in this case than in *Rideau*, *Estes*, and *Sheppard*—all of which were state cases—because petitioner has invoked both the Due Process Clause and Federal Rule of Criminal Procedure 21(a). “As this Court has indicated, its supervisory powers confer ‘more latitude’ to set standards for the conduct of trials in federal courts than in state courts.” *Skilling*, 130 S. Ct. at 2953 n.9 (Sotomayor, J., concurring in part and dissenting in part) (quoting *Mu’Min*, 500 U.S. at 424).⁴ For that reason, “the standard of Rule 21” is “more favorable” to the defendant than the Due Process standard, which pro-

⁴ See, e.g., *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam) (reversing conviction, in exercise of supervisory powers and without finding constitutional violation, based on jurors’ exposure to prejudicial publicity); see also *Murphy*, 421 U.S. at 804 (Burger, C.J., concurring) (“I would not hesitate to reverse petitioner’s conviction in the exercise of our federal supervisory powers, were this a federal case”); *Rideau*, 373 U.S. at 728 (Clark, J., dissenting) (“if this case arose in a federal court, over which we exercise supervisory powers, I would vote to reverse the judgment”).

vides only a “minimum constitutional baseline.” *United States v. Skilling*, 554 F.3d 529, 559 n.39 (5th Cir. 2009), vacated in part on other grounds, 130 S. Ct. 2896 (2010).

That Rule 21 is more protective than the Due Process Clause is confirmed by this Court’s decision in *Skilling*, in which—unlike in this case—the defendant failed to raise a claim under Rule 21. See 130 S. Ct. at 2913 n.11. Had the Court been of the view that the Due Process and Rule 21 standards are identical, it would have had no reason to draw any distinction between them. Instead, the Court took care to point out that, because of the waiver, there was no occasion to decide whether a change of venue would have been required under Rule 21. See *ibid.* (“We therefore review the District Court’s venue-transfer decision only for compliance with the Constitution.”); see also *id.* at 2942 (Alito, J., concurring in part and concurring in the judgment) (“I also do not understand the opinion of the Court as reaching any question regarding a change of venue under Federal Rule of Criminal Procedure 21.”). The Court left open the possibility that a venue change *would* have been required under Rule 21, moreover, even in a case that “share[d] little in common with those [cases] in which [this Court] approved a presumption of juror prejudice.” *Id.* at 2916.

Unlike in *Skilling*, the question whether a presumption of prejudice is warranted under Rule 21 is squarely presented in this case, which—again unlike *Skilling*—has *much* “in common with those in which [this Court] approved [such] a presumption.” 130 S. Ct. at 2916. That makes this case an especially good vehicle for deciding whether the presumption applies.

B. The Court Should Also Grant Certiorari To Decide Whether A Presumption Of Jury Prejudice Is Irrebuttable.

In *Skilling*, the Fifth Circuit held that pervasive pre-trial publicity gave rise to a presumption of jury prejudice, but determined that the presumption was rebuttable and that it was rebutted in that case. See *Skilling*, 130 S. Ct. at 2911-2912. This Court granted certiorari to decide “[w]hether the government may rebut the presumption of prejudice.” Petition for Writ of Certiorari at i, *Skilling*, 130 S. Ct. 2896 (2010) (No. 08-1394), available at 2009 WL 1339243. The Court ultimately “f[ou]nd a presumption of prejudice unwarranted in th[e] case,” however, and thus determined that it “need not, and [would] not, reach th[at] question[],” *Skilling*, 130 S. Ct. at 2912 n.10, 2917 n.18. Because a presumption of prejudice is warranted here, this case presents the Court with an opportunity to decide the question it agreed, but had no occasion, to decide in *Skilling*. The Court has already determined that the question is sufficiently important to justify a grant of certiorari, and it should decide the question now.

1. The question whether a presumption of jury prejudice can be rebutted has divided the lower courts. That is doubtless one of the reasons why the Court granted certiorari to decide the question in *Skilling*. The Fifth and Eleventh Circuits have held that the presumption may be rebutted through voir dire.⁵ By contrast, the Third, Fourth, Ninth, and

⁵ See, e.g., *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir. 1982) (“This presumption is rebuttable, *** and the government may demonstrate from the voir dire that an impartial jury was actually impanelled in [the defendant’s] case.”), overruled in

Tenth Circuits have concluded that, when a presumption of prejudice arises, the case must be tried in a different venue.⁶ A number of state courts of last resort have reached the same conclusion.⁷

As the decisions of this Court make clear, the majority view is correct. In the cases in which this

part on other grounds, *Garrett v. United States*, 471 U.S. 773 (1985); *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006) (en banc) (“[T]he government can rebut any presumption of juror prejudice by demonstrating that the district court’s careful and thorough voir dire *** ensured that the defendant received a fair trial by an impartial jury.”).

⁶ See, e.g., *Flamer v. Delaware*, 68 F.3d 736, 754 (3d Cir. 1995) (en banc) (Alito, J.) (“In order to invoke [the] presumption of prejudice, [t]he community and media ... reaction must have been so hostile and so pervasive as to make it apparent that even the most careful voir dire process would be unable to assure an impartial jury.” (internal quotation marks omitted; second set of brackets and ellipsis added by court)); *United States v. Higgs*, 353 F.3d 281, 307 (4th Cir. 2003) (“[T]he district court must determine whether the publicity is so inherently prejudicial that trial proceedings must be presumed to be tainted, and, if so, grant a change of venue prior to jury selection.” (internal quotation marks omitted)); *Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005) (finding presumption of prejudice and reversing conviction without considering adequacy of voir dire); *United States v. McVeigh*, 153 F.3d 1166, 1182 (10th Cir. 1998) (when presumption of prejudice arises, “we simply cannot rely on jurors’ claims that they can be impartial and declare the publicity to be prejudicial as a matter of law” (internal quotation marks omitted)), overruled in part on other grounds, *Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999).

⁷ See, e.g., *People v. Leonard*, 157 P.3d 973, 993-994 (Cal. 2007) (when presumption of prejudice arises, “the ensuing conviction must be reversed without regard to *** the prospective jurors’ protestations of neutrality during voir dire”); *DeRosa v. State*, 89 P.3d 1124, 1135 (Okla. Crim. App. 2004) (in some cases, “prejudice against the defendant must be presumed and any conviction overturned”).

Court applied a presumption of jury prejudice, it reversed convictions on that basis without any inquiry into whether the presumption was rebutted. Thus, in *Rideau*, “the foundation precedent,” *Skilling*, 130 S. Ct. at 2913, the Court reversed the conviction “without pausing to examine a particularized transcript of the voir dire examination of the members of the jury.” 373 U.S. at 727. Similarly, in *Estes*, after finding that prejudice was “inherent” in the publicity, the Court found it unnecessary to undertake “a careful examination of the facts in order to determine whether [actual] prejudice resulted.” 381 U.S. at 543. Finally, in *Sheppard*, the Court likewise made no inquiry into actual prejudice after finding the publicity to be “inherently prejudicial.” 384 U.S. at 363.

The Court confirmed this view in *Vasquez v. Hillery*, 474 U.S. 254 (1986), which catalogued the types of errors that are subject to a rule of automatic reversal. The Court explained that the “expos[ure] to prejudicial publicity” in *Sheppard* “required reversal of the conviction” because the effect of the exposure “cannot be ascertained.” *Id.* at 263 (emphasis added); accord *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). This understanding of the Court’s presumption-of-prejudice cases is consistent with the basic justification for the presumption, which is that pre-trial publicity can be so prejudicial that “the jurors’ claims that they can be impartial” simply “should not be believed.” *Yount*, 467 U.S. at 1031; accord *Mu’Min*, 500 U.S. at 429. The Court has never suggested that this disbelief can be overcome by a searching voir dire.

2. Even if a presumption of jury prejudice could be rebutted, it was not rebutted here. Because the

district court failed to apply the presumption at all, it did not do what is required in those circuits in which the presumption is rebuttable: place on the government “the burden of proving that the twelve jurors finally impanelled actually were impartial,” a burden that might be met by evidence that the seated jurors “had [n]ever been exposed *** to the inflammatory publicity.” *Mayola v. Alabama*, 623 F.2d 992, 1000-1001 (5th Cir. 1980); see also *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006) (en banc). Instead of deciding whether the government had demonstrated that the seated jurors were not actually exposed to prejudicial publicity, the district court found that “*the Sabhnanis could not demonstrate that any juror was actually exposed to prejudicial publicity.*” App., *infra*, 23a n.8 (emphasis added). Even assuming that the presumption is rebuttable, this gets things exactly backwards.

Because the district court harbored an “erroneous view of the law,” in short, its findings are entitled to no weight. *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). “Historical facts ‘found’ in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions.” *Rogers v. Richmond*, 365 U.S. 534, 547 (1961). If anything, the record here—which includes “an e-mail sent to the court by an excused potential juror[] who claimed that other members of the venire were ‘lying’ and pretending to ‘live in a cave’ in order to serve on the jury,” App., *infra*, 23a, 308a-311a, coupled with the magistrate judge’s refusal to take remedial action in response, *id.* at 316a, 319a—demonstrates that the government would not have been able to discharge its “very difficult” burden of proving that all the seated jurors “actually

were impartial,” *Mayola*, 623 F.2d at 1001, even if the lower courts had correctly held it to that burden.

C. At The Very Least, The Court Should Grant The Petition, Vacate The Judgment Below, And Remand For Further Consideration In Light Of *Skilling*.

If the Court does not grant plenary review, it should grant certiorari, vacate the judgment below, and remand the case (GVR) for reconsideration in light of *Skilling*, which was decided three months after the decision below. As this Court reiterated just last Term, a GVR order is appropriate when (1) “intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration” and (2) “such a re-determination may determine the ultimate outcome of the matter.” *Wellons v. Hall*, 130 S. Ct. 727, 731 (2010) (per curiam) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); ellipsis added by Court). Both criteria are satisfied here.

In the decision below, the Second Circuit acknowledged this Court’s holdings that publicity can be “so highly prejudicial to the defendants” that a court should “presume a fair trial was impossible.” App., *infra*, 22a (citing, *inter alia*, *Rideau*). The court nevertheless determined, without really explaining why, that “neither the character of the publicity nor the extent to which potential jurors were either exposed to it or affected by it” justifies the conclusion that “a presumption or inference of generalized prejudice was appropriate in this case.” *Id.* at 24a.

Because the court of appeals did not have the benefit of this Court’s analysis in *Skilling*, it took no account of the characteristics of *Rideau*, *Estes*, and *Sheppard* that—as *Skilling* has since made clear—gave rise to the presumption of prejudice in these cases, and it failed to address whether those characteristics are present here. As we have explained, the court did not consider the “memorable,” “indelible,” “vivid,” and “unforgettable” nature of the pre-trial publicity; it gave short shrift to the fact that the trial “swiftly followed” the arrests; and it entirely ignored something of “prime significance”: the jury’s guilty verdict on all counts, which resulted in an “overwhelming victory” for the government. *Skilling*, 130 S. Ct. at 2916. There is thus a “reasonable probability” that, if “given the opportunity for further consideration,” *Wellons*, 130 S. Ct. at 731 (internal quotation marks omitted), the court of appeals would reject an implicit premise of its decision—namely, that the considerations subsequently identified in *Skilling* are not fundamental, or even especially relevant, to the presumption-of-prejudice inquiry.

It is equally clear that the court’s “redetermination” of that question could “determine the ultimate outcome” of the case. *Wellons*, 130 S. Ct. at 731 (internal quotation marks omitted). First, under the standard articulated in *Skilling*, the court might well conclude that a presumption of prejudice applies here; indeed, we believe it would be compelled to do so. See Point A, *supra*. Second, because the presumption is not rebuttable—and because, even if it were, it could not be rebutted in this case—presuming prejudice would require that petitioner’s conviction be vacated, and she would be entitled to a new trial before a jury untainted by the pre-trial publicity. See Point B, *supra*.

When, as here, an intervening decision of this Court casts doubt on the decision below, a GVR order both “guarantees to the petitioner full and fair consideration of h[er] rights in light of all pertinent considerations” and “respects the dignity of the Court of Appeals by enabling it to consider *** [a] relevant decision[] *** that w[as] not previously before it.” *Stutson v. United States*, 516 U.S. 193, 197 (1996) (per curiam). If the Court does not grant plenary review, it should issue a GVR order in this case.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for plenary review. In the alternative, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010).

Respectfully submitted.

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