STUCK IN THE 1960s: SUPREME COURT MISSES AN OPPORTUNITY IN *SKILLING V. UNITED STATES* TO BRING VENUE JURISPRUDENCE INTO THE TWENTY-FIRST CENTURY

Comment

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I. *SKILLING* HIGHLIGHTS THE PROBLEMS WITH THE PRESUMPTION OF PREJUDICE STANDARD

Skilling is "the devil," "equivalent [to] an axe murderer," "the biggest liar on the face of the earth," "[should] be hanged," and "would lie to his own mother if it would further his own cause."[1] Prospective jurors made scathing comments toward ex-Enron CEO Jeffrey Skilling on questionnaires prior to his trial on twenty-five counts of securities fraud and insider trading charges.[2] Despite massive pretrial publicity and hostile attitudes toward Skilling in Houston, the District Court for the Southern District of Texas denied defense counsel's motions for a change in venue twice.[3] In appealing his convictions, one of Skilling's arguments was that he was denied a fair trial due to a presumption of prejudice in Houston—based on the circumstances surrounding his trial, the jury pool was presumed prejudicial, and the venue should have been transferred.[4] The facts in *Skilling v. United States* provide a timely example of hostile pretrial publicity and community bias against a criminal defendant, which gave the Supreme Court a chance to find that a presumption of prejudice impeded a defendant's constitutional right to an impartial jury for the first time since 1966.[5]

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1. Brief for Petitioner at 6-8, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394), 2009 WL 4818500 at *6-8.

2. *See Skilling*, 130 S. Ct. at 2908. The questionnaire was a "77-question, 14-page document that asked prospective jurors about . . . their sources of news and exposure to Enron-related publicity, beliefs concerning Enron and what caused its collapse, opinions regarding the defendants and their possible guilt or innocence, and relationships to the company and to anyone affected by its demise." *Id.* at 2909. Skilling's original co-defendants were Richard Causey, who pleaded guilty three weeks prior to trial, and Ken Lay, who died of a heart attack two months after the district court verdict finding him guilty on all counts. *See id.* at 2907, 2909; Carrie Johnson, *Enron's Lay Dies of Heart Attack*, WASH. POST, July 6, 2006, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/07/05/AR2006070500523.html.

3. *See Skilling*, 130 S. Ct. at 2908-10.

4. *See id.* at 2911.

5. *See generally* United States v. McVeigh, 153 F.3d 1166, 1182 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1148 (1999).

In a high-profile trial, potential jurors are faced with immense pretrial publicity from an array of sources due to today's instantaneous technology.[6] When vicious publicity coupled with existing community bias reaches a level such that the entire jury pool is presumed biased against the defendant, the trial must be transferred to a more impartial venue.[7] Two competing standards for deciphering what level of bias and publicity is necessary to trigger this presumption emerged from a series of cases involving prejudicial pretrial publicity in the 1960s.[8] The first few cases in the line set forth an implicit "virtual impossibility" standard, while a later case applied a "reasonable likelihood" approach in determining whether the defendant could receive a fair trial in the current venue.[9] A result from the confusing precedent set by these cases was a split in the federal courts regarding which standard should be applied.[10] An additional unresolved problem was whether or not the government, by showing that no seated juror was actually biased against the defendant, could rebut the presumption.[11] The Supreme Court opinion that declared Skilling received a fair trial further exposed the vagueness and inconsistencies in the presumption of prejudice standard, which will continue to plague high-publicity trials due to the Court's unwillingness to clarify or modernize the standard.[12]

This Comment focuses on the flaws in the presumption of prejudice standard currently applied by the Supreme Court. Because the standard is based on facts from 1960s cases, it is so narrow and outdated that it infringes on a defendant's constitutional right to a fair trial. This Comment proposes a solution for changing the standard that would best protect the right to a fair trial for defendants involved in future high-profile trials. Part II provides the origin of the circuit split, the 1960s line of Supreme Court cases, which establish the conflicting presumption of prejudice standards. Part III follows the development of the split through the federal circuit courts and argues that courts should universally apply the reasonable

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6. *See* Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 44-45 (1996). The authors explain the "four kinds of trials that attract media and national attention to such an extent that they become nationally notorious: (1) 'tabloid-type' cases . . . ; (2) cases in which the nature of the crime is so heinous or shocking . . . ; (3) cases in which the defendants are celebrities . . . ; and (4) cases in which the victims are celebrities." *Id.* (footnotes omitted).

7. *See Skilling*, 130 S. Ct. at 2914.

8. *Compare* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (introducing the "reasonable likelihood" language, which was later adopted as a standard by some circuit courts), *with* Irvin v. Dowd, 366 U.S. 717, 722-24 (1961) (applying implicitly the "virtual impossibility" standard).

9. *See Skilling*, 130 S. Ct. at 2914.

10. *Compare* United States v. Skilling, 554 F.3d 529, 558 (5th Cir. 2009) (using the virtually impossible standard), *with* United States v. Maldonado-Rivera, 922 F.2d 934, 966-67 (2d Cir. 1990) (applying the reasonable likelihood standard).

11. *See Skilling*, 130 S. Ct. at 2917 n.18 (stating that "[t]he parties disagree about whether a presumption of prejudice can be rebutted, and, if it can, what standard of proof governs that issue").

12. *See id.* at 2925; *infra* Part V.B.

likelihood standard, which has a lower threshold for finding a presumption of prejudice. Part IV discusses whether the government should be able to rebut the presumption when it is virtually impossible that the defendant can receive a fair trial in that venue. Part V introduces the Supreme Court's opportunity in *Skilling* to change the confusing standard and its failure to do so. Finally, Part VI puts forth a practical solution that will best protect a defendant's constitutional rights. Ultimately, this Comment recommends that the Court implement a uniform standard by lowering the threshold for a presumption of prejudice to the reasonable likelihood standard and requiring strict safeguards on voir dire.

II. ORIGIN OF THE CIRCUIT SPLIT: EVOLUTION OF THE PRESUMPTION OF PREJUDICE STANDARDS IN THE 1960S

The United States Constitution guarantees criminal defendants the fundamental right to an impartial jury.[13] Both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment ensure this right.[14] With the power to determine the fate of a person's life in the jury's hands, this right is greatly jeopardized when a defendant faces a tainted jury pool.[15] Because of this, "[a] fair trial in a fair tribunal is a basic requirement of due process."[16]

While the Constitution states that the jury should be from the state and district where the crime was committed, this requirement also works to "guarantee that the accused would be fairly dealt with and not unjustly condemned."[17] Federal Rule of Criminal Procedure 21(a) requires the court to transfer the proceedings to another district if there is "so great a prejudice against the defendant [where the crime was committed] . . . that the defendant cannot obtain a fair and impartial trial there."[18] This provides a remedy for situations in which hostility in the district where the crime was committed endangers the defendant's constitutional right to a fair trial.

A. Actual Prejudice v. Presumed Prejudice

When a defendant argues that his Sixth Amendment right is violated due to juror partiality, he must demonstrate that he was convicted by a jury that was actually prejudiced, or in the alternative, that the atmosphere surrounding the trial gave rise to a presumption of prejudice in the

13. U.S. CONST. amends. VI, XIV.
14. *Id.*
15. *See* Irvin v. Dowd, 366 U.S. 717, 722 (1961).
16. *In re* Murchison, 349 U.S. 133, 136 (1955).
17. U.S. CONST. amend. VI; Estes v. Texas, 381 U.S. 532, 538-39 (1965).
18. FED. R. CRIM. P. 21(a).

community as a whole.[19] This prejudice typically stems from community backlash against the defendant's alleged crime and is amplified through media coverage.[20] The process of voir dire is the primary means to discover prejudice or conflict of interest within the jury pool.[21] Here, the court or attorneys have the opportunity to question potential jurors and determine if the individual has the ability to be impartial and base her decision solely on the evidence provided during trial.[22] In order to prove there was actual bias during the trial, the defendant must look to the court transcript from voir dire and point to statements by panel members that demonstrate juror partiality.[23]

If a defendant does not prove there was actual prejudice through voir dire, there is another remedy afforded to him by proving there was a presumption of prejudice against him in the trial venue.[24] In this situation, despite no actual proof of juror bias, the jury pool in that district is presumed prejudiced based on the specific circumstances surrounding the trial, such as the pervasiveness and volume of media coverage about the case.[25] In considering all the relevant factors, if there is a "'pattern of deep and bitter prejudice' shown to be present throughout the community," then there is a presumption that a change of venue is necessary to secure an impartial jury.[26] The policy justification behind this standard is that the American system of justice "has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way justice must satisfy the appearance of justice."[27]

A presumption of prejudice is more difficult for a defendant to prove than actual prejudice, partly due to the interplay of several constitutional rights.[28] Courts must consider the First Amendment freedom of the press because a presumption of prejudice typically stems from the immense level of publicity surrounding a high-profile trial.[29] These conflicting rights are

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19. *See Estes*, 381 U.S. at 543-45.

20. *See id.* (discussing prejudice caused by television coverage of the trial).

21. *See* Skilling v. United States, 130 S. Ct. 2896, 2908-09 (2010).

22. BLACK'S LAW DICTIONARY 1605 (8th ed. 1999). Voir dire, meaning "to speak the truth" in French, is "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." *Id.*

23. *See* Irvin v. Dowd, 366 U.S. 717, 723 (1961).

24. *See Estes*, 381 U.S. at 542-43.

25. *See id.*

26. *Irvin*, 366 U.S. at 727.

27. *Estes*, 381 U.S. at 543 (alteration in original) (emphasis omitted) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)) (internal quotation marks omitted).

28. *See* United States v. McVeigh, 153 F.3d 1166, 1182 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1148 (1999) (noting that "the bar facing the defendant wishing to prove presumed prejudice from pretrial publicity is extremely high"); Skilling v. United States, 130 S. Ct. 2896, 2913 (2010).

29. *See* U.S. CONST. amend. I; *Estes*, 381 U.S. at 539-41. Justice Frankfurter, in his concurring opinion in *Irvin*, considered this balance: "This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived." *Irvin*, 366 U.S. at 730 (Frankfurter, J., concurring).

referred to as the "free press-fair trial conflict" because the freedom of speech must be weighed while also considering the media's effect on placing the defendant's right to an impartial jury in jeopardy.[30] The courts must be reactive to the effects of pretrial publicity because they have limited power to restrict or restrain the media's publication of potentially prejudicial information regarding the defendant or the trial.[31]

Courts must also be wary of assuming jury bias anytime there is a trial that generates a high volume of media buzz.[32] It is likely that the public will be interested in learning more about a sensational or newsworthy trial, particularly one occurring within their district.[33] The Supreme Court recognized this probability in noting that it is "not required . . . that the jurors be totally ignorant of the facts and issues involved [in the case]."[34] Therefore, presumed prejudice "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process."[35] Too low expectations on jury prejudice based on pretrial publicity could open the floodgates to litigation over venue transfer, and also deprive the community from having the trial take place where the alleged crime occurred.[36]

Because of the importance in balancing these varying concerns, the Supreme Court set forth a very narrow test for finding that a presumption of prejudice impeded a defendant's right to a fair trial.[37] The Court has only applied the test in unique circumstances, cases in which such extreme and inflammatory publicity caused a huge "wave of public passion" against the defendant.[38] It is a vague standard partly because there is no bright-line rule to determine a presumption of prejudice; the Court considers the various facts and circumstances on a case-by-case basis.[39] Thus, a presumption of prejudice "is only rarely applicable," and is "confined to those instances where the petitioner can demonstrate an extreme situation of inflammatory

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30. *See, e.g.*, C. Evan Stewart, *The Free Press-Fair Trial Conflict—What's a Lawyer to Say?*, 1 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 1 (1990).

31. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 612 (1976) (Brennan, J., concurring) (explaining that there is "clear and substantial damage to freedom of the press whenever even a temporary restraint is imposed on reporting of material concerning the operations of the criminal justice system"); Judge Eric E. Younger, *The* Sheppard *Mandate Today: A Trial Judge's Perspective*, 56 NEB. L. REV. 1, 2-5 (1977) (discussing the "fundamental *lack of power* of the bench to deal with this type of problem").

32. *See Skilling*, 130 S. Ct. at 2915.

33. *See Irvin*, 366 U.S. at 722.

34. *Id.*

35. Murphy v. Florida, 421 U.S. 794, 799 (1975).

36. *See Skilling*, 130 S. Ct. at 2915-17.

37. *See id.* at 2915.

38. *Irvin*, 366 U.S. at 728.

39. *See Skilling*, 130 S. Ct. at 2949 (Sotomayor, J., concurring in part and dissenting in part); *Irvin*, 366 U.S. at 724-25 ("For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.").

pretrial publicity that literally saturated the community in which his trial was held."[40]

B. Virtual Impossibility Standard Illustrated in Irvin–Rideau–Estes

A trio of Supreme Court cases in the 1960s, known as the *Irvin–Rideau–Estes* line, showcases the extreme situations of pretrial publicity and community partiality necessary to show there was a presumption of prejudice in the venue.[41] These three cases illustrate that a unique occurrence, along with intense media attention surrounding the trial, is a requirement for a defendant to prove that he received an unfair trial based on presumed prejudice.[42] In each of these cases, pervasive media coverage, centered on the defendant's presumed guilt, permeated the community where the defendant was awaiting trial.[43] But persistent media exposure alone is not enough; the Court's decisions in these cases turn on a specific factor, whether it is a publicized confession of guilt by the defendant, or a "circus atmosphere" inside the courtroom.[44]

Eventually, lower courts referred to the reasoning applied by the Court in *Irvin–Rideau–Estes* as the "virtual impossibility" standard—the jury pool must be so corrupted by pretrial publicity that it is virtually impossible for the defendant to receive a fair trial in that venue.[45] The Supreme Court never explicitly used the virtual impossibility language, or any other clear description of a standard, in its opinions in *Irvin*, *Rideau*, and *Estes*. Yet the Supreme Court continues to compare current cases to the relevant facts found in these nearly fifty-year-old cases, which makes it appear that the Court has implicitly applied the virtual impossibility standard.[46]

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40. United States v. Skilling, 554 F.3d 529, 558-59 (5th Cir. 2009) (quoting Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980)).

41. *See* Rideau v. Louisiana, 373 U.S. 723, 724-25 (1963); *Irvin*, 366 U.S. at 725-26.

42. *See* Estes v. Texas, 381 U.S. 532, 536-37 (1965); *Rideau*, 373 U.S. at 726-27; *Irvin*, 366 U.S. at 725-27.

43. *See Rideau*, 373 U.S. at 724-25; *Irvin*, 366 U.S. at 725-26.

44. Murphy v. Florida, 421 U.S. 794, 799 (1975); *see Estes*, 381 U.S. at 536-37; *Rideau*, 373 U.S. at 726-27.

45. *See* Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980). "The principle distilled from this holding [in *Rideau*] by courts subsequently discussing the case is that where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, '[jury] prejudice is presumed and there is no further duty to establish bias.'" *Id.* (second alteration in original) (quoting United States v. Capo, 595 F.2d 1086, 1090 (5th Cir. 1979)).

46. *See* Skilling v. United States, 130 S. Ct. 2896, 2915-16 (2010); United States v. McVeigh, 153 F.3d 1166, 1182 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1148 (1999).

1. Irvin v. Dowd

The first case setting forth the implicit virtual impossibility standard is *Irvin v. Dowd*.[47] In *Irvin*, the defendant stood trial in 1955 for six murders in a rural Indiana town.[48] Such heinous crimes incited the small community's interest, and local newspapers barraged the county for seven months prior to trial with a steady stream of coverage about the defendant.[49] The tone of the news articles presumed the defendant's guilt and focused on the defendant's personal background and past crimes, such as juvenile convictions for arson and burglary.[50] The papers in which these daily stories appeared "were delivered regularly to approximately 95% of the dwellings in Gibson County."[51] Most importantly, the media publicized press releases issued by the police, which stated that the petitioner had confessed to the murders and up to twenty-four other burglaries.[52] During jury selection, the newspapers printed spectator comments such as "'my mind is made up'; 'I think he is guilty'; and 'he should be hanged.'"[53]

Not surprisingly, the jury convicted Irvin, and he was sentenced to death.[54] When the case reached the Supreme Court, the Court vacated the sentence and remanded the case because the defendant did not receive a fair trial based on the fact that "two-thirds of the [jury] members admit[ted] before hearing any testimony, to possessing a belief in his guilt."[55] During voir dire, which lasted four weeks, every person impaneled on the jury confirmed that he could be impartial during the trial—despite 90% of the prospective jurors "entertain[ing] some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty" when previously questioned about the defendant.[56] The Court reasoned that statements by potential jurors insisting they could be impartial could not necessarily be relied on because "where so many [jurors], so many times, admitted prejudice, such a statement of impartiality can be given little weight."[57] This case set the tone for subsequent decisions affirming the importance of a defendant's right to an impartial jury.

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47. *See Irvin*, 366 U.S. at 727-28.
48. *Id.* at 719-20.
49. *See id.* at 725-27.
50. *See id.* at 725. "The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess." *Id.*
51. *Id.* at 725.
52. *Id.* at 719-20, 726.
53. *Id.* at 727.
54. *Id.* at 718.
55. *Id.* at 728-29.
56. *Id.* at 727-28.
57. *Id.* at 728.

2. Rideau v. Louisiana

Decided just two years later, *Rideau v. Louisiana* involved a defendant who committed a murder during the course of a bank robbery in a quiet town in Louisiana.[58] While Rideau was in jail before trial, the county sheriff filmed his "interview" with the defendant, in which Rideau confessed to committing the bank robbery and murder.[59] The film was televised in the following two days to about two-thirds of the local community.[60] For those who watched it, the broadcast "was Rideau's trial —at which he pleaded guilty to murder."[61]

In concluding that the defendant did not receive a fair trial based on a presumption of prejudice in the community, the Court explained that "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."[62] The Court did not even conduct a detailed review of the voir dire transcript because the possibility that some of the jurors viewed Rideau's confession was enough to presume juror bias.[63] This is the fundamental difference between actual prejudice and presumed prejudice: a presumption of prejudice does not require the defendant to prove that any single juror was in fact biased, but rather the entirety of the circumstances presumes that the jury pool as a whole could not be impartial.[64]

3. Estes v. Texas

The final case developing the virtual impossibility standard, *Estes v. Texas*, focused on the level of media attention inside the courtroom of a well-known swindler's trial in Texas, just two years after *Rideau*.[65] The trial court previously granted a change in venue, and the trial took place 500 miles west of where the defendant's alleged fraudulent misrepresentations of merchandise occurred.[66] During the initial two-day hearing, twelve cameramen and news photographers packed the courtroom.[67] Media

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58. Rideau v. Louisiana, 373 U.S. 723, 723-24 (1963).

59. *Id.* at 724-25 (noting that the plan to record and televise the jailhouse interview was "carried out with the active cooperation and participation of the local law enforcement officers," and there was no evidence that Rideau was aware of what was going on).

60. *See id.* at 724.

61. *Id.* at 726.

62. *Id.*

63. *See id.* at 728. "The Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it." Estes v. Texas, 381 U.S. 532, 543 (1965).

64. *See* Murphy v. Florida, 421 U.S. 794, 798-99 (1975); *Estes*, 381 U.S. at 543-45.

65. *Estes*, 381 U.S. at 535-36.

66. *Id.* at 535.

67. *Id.* at 535-36.

disruptions led to a circus-like atmosphere inside the courtroom.[68] Subsequent evening broadcasts of the hearings "could only have impressed those present, and also the community at large, with the notorious character of the petitioner as well as the proceeding."[69]

The Court recognized that while "there was nothing so dramatic as a home-viewed confession" in this case, the media's infiltration of the court proceedings poisoned the minds of potential jurors in the community.[70] Touching on the specific technology used to spread the publicity, the Court noted that "[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced."[71] Even in 1963, the Court was cognizant of the effect that new media technology could have on potential jurors. Stressing that the possibility that the jury was in fact impartial was too big a risk to take in such an environment, the Court employed a per se rule of reversal rather than proving the publicity's actual effect on jury members.[72]

C. A Different Standard Emerges in Sheppard v. Maxwell

Just one year after the *Estes* decision, the Court decided *Sheppard v. Maxwell*, in which the Court articulated a different presumption of prejudice standard referred to as the reasonable likelihood standard.[73] In *Sheppard*, the Court introduced new language for finding a presumption of prejudice by stating, "where 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."[74] The Court did not make it clear that it was announcing a new standard, so it is possible that this language was merely dicta rather than a divergence from the previous line of cases.[75] Regardless, several of the federal circuit courts adopted the reasonable likelihood standard based on this case.[76]

Despite the introduction of this new language, there are many factual similarities between *Sheppard* and the previous three cases. Before and

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68. *See id.*; *Murphy*, 421 U.S. at 799.
69. *Estes*, 381 U.S. at 536.
70. *Id.* at 538.
71. *Id.* at 544.
72. *See id.* at 544.
73. *See* Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966).
74. *Id.* at 363 (emphasis added).
75. *See id.*
76. *See, e.g.*, United States v. Maldonado-Rivera, 922 F.2d 934, 966-67 (2d Cir. 1990) ("[A] defendant must show 'a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial.'").

during the trial of Sheppard, a man accused of murdering his pregnant wife in Ohio, there was immense pretrial publicity as well as a large media presence inside the courtroom.[77] During the county's investigation of the murder, Sheppard was required to reenact the tragic events at his home in the presence of a "group of newsmen, who apparently were invited by the [c]oroner."[78] Stories of Sheppard's infidelity and his conflicting versions of the events on the night of his wife's murder flooded the newspapers.[79] The newspaper coverage intensified by publishing evidence that was twisted to incriminate Sheppard and "pointed out discrepancies in his statements to authorities."[80] The papers even printed individual pictures of the prospective jurors, and pictures of the actual jurors during trial were published over forty times in Cleveland newspapers.[81] This publicity thrust the jury into the role of celebrities and "exposed them to expressions of opinion from both cranks and friends."[82]

Pretrial publicity alone is not what the Court relied on in holding that Sheppard was denied a fair trial; it was also the "carnival atmosphere" during the trial and presence of news media inside the courtroom.[83] The trial atmosphere "deprived [Sheppard] of that 'judicial serenity and calm to which [he] was entitled.'"[84] In reversing Sheppard's conviction, the Court found that a change in venue was necessary to shield Sheppard from the "inherently prejudicial publicity[,] which saturated the community."[85] This decision marked the last occasion that the Supreme Court reversed a conviction based on publicity surrounding a trial.[86] Subsequent decisions

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77. *See Sheppard*, 384 U.S. at 335-37. One of many examples of unfavorable publicity "included items such as a cartoon of the body of a sphinx with Sheppard's head and the legend below: '"I Will Do Everything In My Power to Help Solve This Terrible Murder."—Dr. Sam Sheppard.'" *Id.* at 341-42. The courtroom was described as "crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard." *Id.* at 344.

78. *Id.* at 338.

79. *Id.* at 340. Newspapers "played up Sheppard's refusal to take a lie detector test," and headlines announced, "Doctor Balks At Lie Test; Retells Story." *Id.* at 338.

80. *Id.*

> Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was "a bare-faced liar" because of his testimony as to police treatment; and finally, that a woman convict claimed Sheppard to be the father of her illegitimate child.

Id. at 356-57.

81. *Id.* at 345.

82. *Id.* at 353.

83. *See id.* at 357-58; *id.* at 355 (observing that "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom"); Skilling v. United States, 130 S. Ct. 2896, 2914 (2010).

84. *Sheppard*, 384 U.S. at 355 (second alteration in original).

85. *Id.* at 363.

86. *See* discussion *infra* Part II.D.

illustrated that the Court was apparently less willing to presume prejudice than it had been in the past.[87]

D. The Standard Applied by the Supreme Court Is Still Unclear

It is uncertain whether the Court intended to change the presumption of prejudice standard in *Sheppard*.[88] First, the Court did not explicitly clarify that it was introducing a new standard for the presumption of prejudice in its opinion. Second, the Court did not use the reasonable likelihood language in the next case that it considered involving pretrial publicity.[89] The case, *Murphy v. Florida*, was decided nine years after *Sheppard*.[90] Here, the Court did not refer to the reasonable likelihood standard or any other named standard in its analysis.[91] Rather, the Court compared the facts of *Murphy* to those found in *Irvin–Rideau–Estes* as well as *Sheppard*, in holding that the petitioner failed to show that he did not receive a fair trial based on a presumption of prejudice.[92]

The facts of *Murphy* are similar to the previous cases in which the Court held that a presumption of prejudice applied, but this time the Court found that the pretrial publicity did not meet the level necessary for the presumption of prejudice to arise.[93] Before and during Murphy's trial for a robbery in Dade County, Florida, there were many newspaper stories disclosing Murphy's prior convictions for jewel theft and murder.[94] These stories reached so many people in the area that twenty of seventy-eight prospective jurors were excused because they expressed an opinion about Murphy's guilt.[95] Yet, the Court concluded that the media attention surrounding the trial was not extreme enough to mirror the facts in *Irvin–Rideau–Estes*.[96] In addition, there was no evidence that any jurors were actually prejudiced by their knowledge of the defendant's prior convictions.[97] By failing to apply the reasonable likelihood standard set forth in *Sheppard*, or otherwise delineate a standard, the Court left the standard for a presumption of prejudice unclear.[98]

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87. *See* discussion *infra* Part II.D.

88. *Compare Sheppard*, 384 U.S. at 363 (applying the reasonable likelihood standard), *with* Murphy v. Florida, 421 U.S. 794, 798-800 (1975) (comparing the facts in the case to those in *Irvin*, *Rideau*, and *Estes*).

89. *See Murphy*, 421 U.S. at 798-800.

90. *See id.*

91. *See id.*

92. *See id.* at 800-04.

93. *See id.* at 803.

94. *See id.* at 798-800.

95. *See id.* at 796.

96. *See id.* at 798-801.

97. *See id.* at 802-03.

98. *See id.*

The Court has clung to the fact patterns from the 1960s cases in setting the line between which circumstances allow a presumption of prejudice and which do not.[99] Rather than applying a specific standard, the Court's test continues to rely on whether the facts of the current case are sufficient to meet the high threshold set by the facts in *Irvin–Rideau–Estes* and *Sheppard*—despite the Court's exercise of a lower standard in *Sheppard*.[100] Only a few cases involving a presumption of prejudice were considered by the Court after *Sheppard*, and *Sheppard* is the last time the Court held that a defendant received an unfair trial due to a presumption of prejudice in the community.[101] The Court's opinion in *Skilling* continued the tradition of applying facts from a now half-century-old line of cases in concluding that the facts in *Skilling* did not meet the level necessary to prove a presumption of prejudice.[102]

III. DEVELOPMENT OF THE SPLIT THROUGH THE FEDERAL CIRCUITS

Stemming from the vague and conflicting standards set out by the Supreme Court in the 1960s, the federal circuit courts are split on the level of pretrial publicity necessary to prove that a presumption of prejudice infringed on a defendant's right to a fair trial.[103]

A. Fifth Circuit, Among Others, Applies the Virtually Impossible Standard

Just a few months after *Sheppard*, the Fifth Circuit (which decided *Skilling* at the circuit court level) decided one of its first cases involving a presumption of prejudice argument in *Pamplin v. Mason*.[104] In this case, the court reversed the defendant's conviction for assaulting a local peace officer, which occurred when the African-American defendant was arrested for participating in the first sit-in demonstration at a white restaurant in a small Texas community.[105] The court determined that there were "inherently suspect circumstances of racial prejudice" against the defendant, and "[w]here racial feeling may be strong, the voir dire . . . can hardly be expected to reveal the shades of prejudice that may influence a

99. *See* Skilling v. United States, 130 S. Ct. 2896, 2915-16 (2010).

100. *See* United States v. McVeigh, 153 F.3d 1166, 1182 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1148 (1999) ("The circumstances that led the Court to presume prejudice in *Sheppard*, *Estes*, and *Rideau* simply do not exist in this case.").

101. *See* Mu'Min v. Virginia, 500 U.S. 415, 415 (1991); Patton v. Yount, 467 U.S. 1025, 1027-29 (1984).

102. *See Skilling*, 130 S. Ct. at 2901-04.

103. *Compare* United States v. Skilling, 554 F.3d 529, 558 (5th Cir. 2009) (using the virtually impossible standard), *with* United States v. Maldonado-Rivera, 922 F.2d 934, 966-67 (2d Cir. 1990) (applying the reasonable likelihood standard).

104. *See* Pamplin v. Mason, 364 F.2d 1, 5 (5th Cir. 1966).

105. *Id.* at 2-3.

verdict."[106] This opinion reflected the confusing precedent set by the 1960s Supreme Court cases, because while the opinion cited the presumption of prejudice test using the reasonable likelihood language from *Sheppard*, it also announced: "[We] apply the *Irvin* holding with the gloss of *Rideau*, *Estes*, and *Sheppard*."[107] Because it applied the holding from *Irvin*, it seems the Fifth Circuit did not interpret the reasonable likelihood language in *Sheppard* as setting forth a new standard for the presumption of prejudice. It may have considered the language as dicta or guidance in applying the test rather than as setting a new precedent.

Within fifteen years of *Pamplin*, Fifth Circuit opinions made it clear that it was applying a virtually impossible standard.[108] In 1979, the court's opinion in *United States v. Capo* declared that it must simply be *impossible* for the defendant to receive a fair trial.[109] The court arrived at this conclusion by observing that in cases such as *Estes* and *Sheppard*, "prejudicial publicity so poisoned the proceedings that it was impossible for the accused to receive a fair trial by an impartial jury."[110]

The Fifth Circuit later updated the standard by adding the qualifier "virtually," although the analysis remains the same.[111] The Fifth Circuit's opinion in *Skilling* adopted the virtual impossibility standard by explaining that to prove a presumption of prejudice, "an appellant can demonstrate that prejudicial, inflammatory publicity about his case so saturated the community from which his jury was drawn as to render it *virtually impossible* to obtain an impartial jury."[112] Based on the facts surrounding Skilling's trial, the Fifth Circuit found that it indeed was virtually impossible to obtain an impartial jury in Houston.[113] Yet, because it determined that the presumption was rebuttable, the Fifth Circuit held that

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106. *Id.* at 7.

107. *Id.* at 5.

> As we read the Supreme Court cases [*Irvin*, *Rideau*, *Estes*, and *Sheppard*], the test is: Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial. As the Supreme Court stated in *Sheppard v. Maxwell*:
>
> ". . . [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."

Id. at 5-6 (second alteration in original) (quoting Sheppard v. Maxwell, 384 U.S. 333, 362 (1966)).

108. *See* Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980); United States v. Capo, 595 F.2d 1086, 1090 (5th Cir. 1979).

109. *Capo*, 595 F.2d at 1090.

110. *Id.*

111. *See Mayola*, 623 F.2d at 997.

112. United States v. Skilling, 554 F.3d 529, 558 (5th Cir. 2009) (emphasis added) (quoting United States v. Chagra, 669 F.2d 241, 250 (5th Cir. 1982)).

113. *Id.* at 560-61; *see infra* Part V.A.

the Government's showing that no actual prejudice permeated the jury ultimately negated the presumption.[114]

In addition to the Fifth Circuit, the Tenth Circuit also relies on the virtual impossibility standard by stating, "[i]n this circuit . . . prejudice will only be presumed where publicity 'created either a circus atmosphere in the court room or a lynch mob mentality such that it would be impossible to receive a fair trial.'"[115] In *United States v. McVeigh*, Timothy McVeigh was accused of bombing a federal building that housed the federal courts in Oklahoma City, killing 168 people.[116] The District Court for the Western District of Oklahoma granted McVeigh's first motion for a change in venue because "the intensity of the emotional impact of the bombing, and its attendant publicity, on all Oklahomans, [would make it] impossible for McVeigh to receive a fair jury trial anywhere in the State of Oklahoma."[117] The Court transferred the proceedings to Denver, Colorado, because it is a large metropolitan area and also because "the Denver jury pool was not as intensely affected by the bombing or the subsequent publicity as was the Oklahoma jury pool."[118] There, McVeigh was convicted and sentenced to death.[119]

On appeal to the Tenth Circuit, McVeigh claimed he was "denied due process of law under the Fifth Amendment and his right to trial by an impartial jury under the Sixth Amendment" based on presumed and actual prejudice due to pretrial publicity in Denver.[120] The court considered the prejudicial effect of reports in Denver newspapers stating that McVeigh confessed to the crime to his attorneys.[121] In comparing the facts of *McVeigh* to those in *Estes*, *Rideau*, and *Sheppard*, the court concluded that McVeigh was not denied his constitutional right based on the "hearsay nature of the reports of McVeigh's confession, the publicized denial of the accuracy of those reports, the strong admonitions given by the court" as well as the large number of prospective jurors who were not aware of the report.[122] Thus, it was not virtually impossible that McVeigh could receive a fair trial in the already more impartial venue of Denver. This decision

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114. *See Skilling*, 554 F.3d at 561-62.

115. Goss v. Nelson, 439 F.3d 621, 628 (10th Cir. 2006) (quoting Hale v. Gibson, 227 F.3d 1298, 1332 (10th Cir. 2000)).

116. United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1148 (1999).

117. *Id.* at 1180.

118. *Id.*

119. *Id.* at 1176.

120. *Id.* at 1179, 1182. The court stated that in order for a court to find that "inflammatory pretrial publicity so permeated the community as to render impossible the seating of an impartial jury, the court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial." *Id.* at 1181.

121. *Id.* at 1182-83.

122. *Id.* (stating that "[t]he circumstances that led the Court to presume prejudice in *Sheppard*, *Estes*, and *Rideau* simply do not exist in this case").

explained that even circumstances that closely fit the facts in a previous case in which a presumption of prejudice was found—such as the publicized guilty confession in *Rideau*—would not necessarily be viewed as dispositive in light of other mitigating factors.

B. A Small Number of Circuits Apply the Reasonable Likelihood Standard

The Second Circuit is one of the few circuits that clings to the reasonable likelihood standard as set out in *Sheppard*.[123] In order for a defendant to prevail in arguing there was a presumption of prejudice, he must show "a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial."[124] The court may take into account various factors in determining whether there is a reasonable likelihood that the defendant will receive an unfair trial, such as "the extent to which the publicity focuses on the crime rather than on the individual defendants charged with it, and other factors reflecting on the likely effect of the publicity on the ability of potential jurors in the district to hear the evidence impartially."[125]

Even as recently as March 2010, the court affirmed its reliance on this standard in *United States v. Sabhnani*.[126] In this case, a couple was accused of keeping two Indonesian women as domestic slaves and inflicting various forms of psychological and physical torture on them for several years.[127] The tabloid newspapers described it as a case of "modern day slavery" and printed details of the ways that the Sabhnanis allegedly tortured the two women in their home.[128] In affirming the district court's denial of the defendant's motion to transfer venue, the court noted 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."[129] The media coverage was primarily based on the prosecution's portrayal of the case and was not so prejudicial to create a reasonable likelihood that an unfair trial would occur.[130]

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123. *See* United States v. Sabhnani, 599 F.3d 215, 232-33 (2d Cir. 2010) (holding that "pretrial publicity here was not so pervasive and prejudicial as to have created a reasonable likelihood that a fair trial could not be conducted" because publicity was mainly coverage of actual developments in the trial).

124. United States v. Maldonado-Rivera, 922 F.2d 934, 966-67 (2d Cir. 1990) (quoting Sheppard v. Maxwell, 384 U.S. 333, 363 (1966)).

125. *Id.* at 967.

126. *See Sabhnani*, 599 F.3d at 232.

127. *See id.* at 224-27.

128. *Id.* at 232.

129. *Id.* at 233.

130. *See id.* at 232-33.

C. Rare Instances When Circuit Courts Have Found a Presumption of Prejudice

The extremely high bar set by the Supreme Court on the presumption of prejudice begs the question: What factual situations *are* sufficient for a court to hold that a defendant has been denied his constitutional right to a fair trial due to a presumption of prejudice? As expected, there are only a few cases in which any circuit court has reversed a conviction and remanded based on a presumption of prejudice.[131]

In one such case, *Coleman v. Kemp*, the Eleventh Circuit held that a presumption of prejudice existed based on the pretrial publicity of the defendant's role in six murders.[132] The location of the murders—Seminole County, Georgia—had a small population of 7,059, and 85% of its households received the local newspaper.[133] The victims of the murders were well-known and respected within the small community.[134] The court cited hundreds of newspaper articles from the evidence in support of its decision that "[a]pplying the extremely high standard of review, [the virtual impossibility standard,] our review of the record in the instant case leads to the inescapable conclusion that petitioner Coleman was denied his right to a fair trial before an impartial jury."[135] The court also noted that it was a close case because of the extremely high standard that is required.[136] The publicity provoked hostility towards the defendant and reflected the opinion of the community that death was the only penalty sufficient for Coleman.[137] The court reasoned that the facts of the case were even stronger than those in *Rideau* because of the community demands for Coleman's death.[138] But cases like *Coleman* are the exception. Overall, the history of presumption of prejudice cases illustrates that there is not one clear standard, which provides little guidance for future courts in grappling with cases involving prejudicial pretrial publicity.

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131. *See* Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985); Pamplin v. Mason, 364 F.2d 1, 5 (5th Cir. 1966); United States *ex rel.* Bloeth v. Denno, 313 F.2d 364, 374 (2d Cir. 1963).

132. *See Coleman*, 778 F.2d at 1491.

133. *Id.*

134. *Id.* at 1539.

135. *Id.* at 1538. "[L]aw enforcement officials announced that circumstantial evidence against the suspects was 'overpowering,' and that 'there's no point in looking for anybody else.' The press revealed that the suspects' fingerprints had been found at the scene of the crime." *Id.*

136. *Id.*

137. *See id.* at 1538-39. The sheriff was quoted in a newspaper article as stating about the defendants, "If I had my way about it, I'd have me a large oven and I'd precook them for several days, just keep them alive and let them punish. . . . And I don't think that would satisfy me." *Id.* at 1501 (alteration in original).

138. *See id.* at 1539-40.

D. The Reasonable Likelihood Standard Should Be Universally Applied

"Justice is best served when the law is both specific and predictable."[139] Without a clear, unifying standard espoused by the Supreme Court, parties that appeal a case to the Court on the basis of a presumption of prejudice are unable to predict the outcome of their case with any certainty.[140] One commentator noted that "[s]uch a standardless approach to pretrial publicity is problematic because it creates deference by a court to a point of neglect of a serious and growing problem."[141] In order to determine which standard is most effective in preventing unfair trials, courts must weigh various public policy considerations.[142] When a defendant is faced with a biased jury, he is deprived of his Sixth Amendment right to an impartial jury—a risk that the earliest members of the Supreme Court were not willing to take.[143] As early as 1807, Chief Justice John Marshall noted: "The theory of the law is that a juror who has formed an opinion cannot be impartial."[144]

Because it requires a lower threshold, the reasonable likelihood standard affords the defendant greater protection from a biased jury.[145] Applying the reasonable likelihood standard is the best way to ensure that a defendant's Sixth Amendment right is protected.[146] Showing that a presumption of prejudice exists will nevertheless be difficult to prove. The burden is on the defendant to show that the negative effects of pretrial publicity were so pervasive and intense in order to meet the reasonable likelihood standard.[147]

In applying the reasonable likelihood standard, it is important that the courts ensure that granting a change of venue is not overused and that it is still reserved for unusual circumstances involving a high degree of prejudicial publicity.[148] Unusual circumstances do not mean that a case's factual situation must match the facts set out in *Irvin–Rideau–Estes* and *Sheppard*—those cases set forth examples of circumstances that have been successful in securing a presumption of prejudice, but they should not be

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139. Hardaway & Tumminello, *supra* note 6, at 66.

140. *See id.* The authors noted that "the appellate court simply compares the current factual situation on review with past factual situations to determine if there is a close enough fit between the two to warrant a similar result." *Id.* at 65.

141. *Id.* at 44.

142. *See id.* at 63-68.

143. *See* Irvin v. Dowd, 366 U.S. 717, 722 (1961).

144. *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 155 (1878)).

145. *See* Hardaway & Tumminello, *supra* note 6, at 57-58.

146. *See id.*

147. *See* Coleman v. Kemp, 778 F.2d 1487, 1537 (11th Cir. 1985) ("[T]he burden placed upon the petitioner to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one.").

148. *See supra* Part II.C.

viewed as setting the threshold.[149] Nor are they representative of today's circumstances—they are not consistent with current media technology and do not address the effects of publicity on large communities.

A textual argument for utilizing the reasonable likelihood standard is that the Court never used the phrase "virtually impossible" in its *Irvin–Rideau–Estes* opinions, while it did use the "reasonable likelihood" terminology in *Sheppard*.[150] The Court, however, also chose not to continue its use of that language as an explicit standard in its decisions after *Sheppard*.[151] Therefore, it is possible that the Supreme Court has been implicitly applying the higher standard since the 1960s. After all, the Court noted that the presumption of prejudice should only be used in rare instances when the circumstances are unique enough to warrant its use, and applying the reasonable likelihood standard may dilute the purpose of applying the presumption.[152]

With courts already overburdened with cases, one concern with using the reasonable likelihood standard is that it would lead to an overflow in transfer motions, which the courts would have to wade through.[153] A lower standard might mean that courts in other districts will be burdened by an influx in transferred venue cases.[154] One of the premises of the Constitution, that trials should be held in the venue where the crime was committed, should not be easily sidestepped.[155] If the defendant allegedly caused harm to members of the community, then the community should have the opportunity to view the trial in person and have the jury drawn from the community.[156] Community participation is "essential to what the Supreme Court has described as the 'community therapeutic value' of the trial, whereby the criminal trial becomes a vehicle for healing the social rupture caused by the crime."[157]

These two competing constitutional values—the defendant's right to a trial by an impartial jury and the community's interest in having the trial where the alleged crime occurred—must, therefore, be weighed.[158] This is

149. *See supra* Part II.B.

150. *See infra* Part IV.

151. *See* Murphy v. Florida, 421 U.S. 794, 798-800 (1975) (comparing the facts in the case to those in *Irvin*, *Rideau*, and *Estes*).

152. *See* United States v. Skilling, 554 F.3d 529, 558-59 (5th Cir. 2009).

153. *See supra* Part III.B.

154. *See supra* Part III.B.

155. *See* U.S. CONST. amend. VI.

156. *See* Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1550-51, 1559 (1993) (arguing that because a jury is the "conscience of the community," it has a valid interest in "hosting the trial").

157. Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1661 (2000) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570-73 (1980)).

158. *See* Levenson, *supra* note 156, at 1559. The author notes that "[t]here are rare cases where a change of venue is needed because undue publicity or community atmosphere has made it impossible for the criminal defendant to receive a fair trial. In these situations, the defendant's constitutional right to a fair trial outweighs the affected community's interest in hosting the trial." *Id.*

why there is a required threshold to find a presumption of prejudice in order to consider transferring venue. The reasonable likelihood standard sets a high enough bar to prevent the floodgates from opening with motions to transfer venue due to a presumption of prejudice.[159] If the reasonable likelihood standard is coupled with an opportunity for the prosecution to rebut the presumption by proof of no actual prejudice, then a proper balance can be drawn between the rights of the defendant and interests of the community.[160]

IV. IS THE PRESUMPTION OF PREJUDICE REBUTTABLE?

A. Fifth Circuit Says Yes

Another question that the Supreme Court declined to determine in *Skilling* was whether the presumption of prejudice was rebuttable.[161] The Fifth Circuit disagreed with the district court's characterization of the media's coverage of *Skilling* as "'objective and unemotional' . . . with a 'largely fact-based tone.'"[162] Given the widespread injury that Enron's collapse inflicted on the City of Houston, the court determined that "[t]here was sufficient inflammatory pretrial material to require a finding of presumed prejudice, especially in light of the immense volume of coverage."[163] It was not simply the longevity or aggressiveness of media coverage, but the number of victims and devastating impact on the economy that fueled the personal feelings of anger and desire for retribution centered against those involved in the operation of Enron.[164]

Yet the Fifth Circuit stated, "despite our agreement with Skilling that we can presume prejudice in this case . . . '[t]his presumption is rebuttable . . . and the [G]overnment may demonstrate from the *voir dire* that an impartial jury was actually impaneled in appellant's case.'"[165] Basically, if the Government can prove that there was no *actual* prejudice in the jury box, then the presumption of prejudice does not apply.[166] The authorities

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159. *See supra* Part III.D.

160. *See supra* Part III.D.

161. Skilling v. United States, 130 S. Ct. 2896, 2917 n.18 (2010) ("Because we hold that no presumption arose, we need not, and do not, reach these questions.").

162. United States v. Skilling, 554 F.3d 529, 559 (5th Cir. 2009).

163. *Id.* Even the sports page of the *Houston Chronicle* presumed Skilling's guilt in an article stating: "If you believe the story about [Coach Bill Parcells] not having anything to do with the end of Emmitt Smith's Cowboys career, then you probably believe in other far-fetched concepts. Like Jeff Skilling having nothing to do with Enron's collapse." *Skilling*, 130 S. Ct. at 2943 (alteration in original).

164. *See Skilling*, 554 F.3d at 560. The *Houston Chronicle* ran hundreds of sympathetic stories on the "People of Enron" with statements from them such as: "I'm livid, absolutely livid . . . . I have lost my entire friggin' retirement to these people. They have raped all of us." *Id.* at 559 n.42.

165. *Id.* at 558 (first alteration in original) (quoting United States v. Chagra, 669 F.2d 241, 250 (5th Cir. 1982)).

166. *See id.*

that the court cited for this proposition were other Fifth Circuit cases because the Supreme Court has not determined whether this concept comports with constitutional standards.[167]

The Fifth Circuit concluded that the district court's voir dire was "exemplary" and "the actual jury that convicted Skilling was impartial," despite voir dire only lasting five hours and the court refusing to delve any deeper than cursory questions regarding the venire's media exposure to the trial.[168] Although there is no minimum time requirement for voir dire, and this factor is not dispositive as to its effectiveness, the length of time can shed some light on the scope of the process.[169] In contrast to the five hours spent in *Skilling*, Timothy McVeigh's voir dire lasted eighteen days *after* a change of venue, Martha Stewart's lasted six days, and Bernard Ebbers's of Worldcom lasted two days.[170] The reason why voir dire was so short in *Skilling* is because the court decided to ask the questions during voir dire and exhibited that it had no tolerance for more than a few short follow-up questions by counsel—if that.[171]

The Fifth Circuit first implemented the concept that the presumption of prejudice could be rebutted in the 1980 decision of *Mayola v. Alabama*.[172] In *Mayola*, the defendant argued that the media coverage surrounding his alleged murder of an eleven-year-old boy was so prejudicial that it was impossible for him to receive a fair trial in the small county of Alabama where the killing occurred.[173] The court determined that even if prejudice was "undisputedly proved," the "State *should* have had the opportunity to redeem the conviction from this presumption of invalidity by shouldering the burden of proving that the twelve jurors finally impaneled actually were impartial."[174] The Fifth Circuit acknowledged that "no court has yet broached this question whether the presumption of jury prejudice under *Rideau* is rebuttable," yet it simply concluded that the state deserved the

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167. *See Chagra*, 669 F.2d at 250; William H. Farmer, *Presumed Prejudiced, but Fair?*, 63 VAND. L. REV. EN BANC 5, 9 (2010), http://www.vanderbiltlawreview.org/articles/2010/03/Farmer-Presumed-Prejudiced-63-Vand.-L.-Rev.-En-Banc-5-20101.pdf (asking and answering "[w]ill the Court examine whether the presumption should continue to be rebuttable? I see this as a real possibility").

168. *Skilling*, 130 S. Ct. at 2947-48, 2962 (Sotomayor, J., concurring in part and dissenting in part) (noting that "[w]hile several seated jurors and alternates did not make specific comments suggesting prejudice, their written and oral responses were so abbreviated as to make it virtually impossible for the District Court reliably to assess whether they harbored any latent biases").

169. *Id.* at 2956.

170. Brief of Defendant-Appellant Jeffrey K. Skilling at 159 n.87, *Skilling*, 554 F.3d 529 (No. 06-20885), 2007 WL 2804318 at *159.

171. Brief for Petitioner, *supra* note 1, at 10 (stating the court "twice chastis[ed] defense counsel for asking too many questions about potential prejudice because the court had prohibited 'individual voir dire'").

172. Mayola v. Alabama, 623 F.2d 992, 994, 997 (5th Cir. 1980).

173. *Id.*

174. *Id.* at 1000-01 (emphasis added).

opportunity to rebut the presumption without much explanation as to why.[175]

The Fifth Circuit views the presumption of prejudice as "a burden-shifting framework: Once the defendant musters sufficient evidence of community hostility, the onus shifts to the Government to prove the impartiality of the jury."[176] When the burden shifts, the court reviews the voir dire transcripts to ensure that any biased jurors were not seated on the panel.[177]

The Fifth Circuit is not the only circuit court to conclude that the presumption of prejudice can be rebutted.[178] In *Coleman v. Kemp*, the Eleventh Circuit declined to read *Rideau* as implying that voir dire cannot rebut a presumption of prejudice and agreed with *Mayola* and *Pamplin* in assuming that there can be such a rebuttal.[179] The Eighth Circuit has likewise adopted the standard from *Mayola* by agreeing, "the [S]tate should have the opportunity to show" that no actual prejudice resulted from the publicity.[180]

B. Rebutting a Presumption of Prejudice Raises Sufficiency of Voir Dire Issues

Whether the Government can rebut the presumption of prejudice is yet another example of the ambiguity engendered by the presumption of prejudice standard. By declining to consider whether a presumption of prejudice was rebuttable in *Skilling*, the Court missed another opportunity to improve the standard.[181]

The Supreme Court should have decided this issue because the idea that the presumption of prejudice can be rebutted when the standard of virtual impossibility is used effectively eliminates the rationale for the presumption of prejudice altogether by replacing it with the actual prejudice standard.[182] The purpose of the presumption of prejudice is the idea that "in particularly extreme circumstances, even the most rigorous voir dire cannot suffice to dispel the reasonable likelihood of jury bias."[183] The Court in *Irvin* specifically stated that voir dire would not be sufficient in ferreting out juror bias because a juror's assurances of impartiality could not be

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175. *Id.* at 1001.

176. Skilling v. United States, 130 S. Ct. 2896, 2948 (2010) (Sotomayor, J., concurring in part and dissenting in part).

177. *See id.*

178. *See* United States v. Campa, 459 F.3d 1121, 1143 (11th Cir. 2006); Cotton v. Mabry, 674 F.2d 701, 705 n.4 (8th Cir. 1982).

179. Coleman v. Kemp, 778 F.2d 1487, 1542 n.25 (11th Cir. 1985).

180. *See Cotton*, 674 F.2d at 705 n.4.

181. *Skilling*, 130 S. Ct. at 2917 n.18.

182. *See id.*

183. *Id.* at 2949 (Sotomayor, J., concurring in part and dissenting in part).

decisive, particularly when "the build-up of prejudice [in the community] is clear and convincing."[184] This stands for the proposition that, in a venue where it is virtually impossible that a defendant can receive a fair trial, even the most effective voir dire cannot eliminate prejudice in the jury pool.[185] However, if the threshold applied to find a presumption of prejudice is lowered to the reasonable likelihood standard, it is more likely that careful voir dire would be effective in searching out an impartial jury within the original venue.

The Supreme Court has never held that when there is a presumption of prejudice, doubt about the impartiality of the jurors is overcome simply by concluding that there was no *actual* prejudice.[186] In *Rideau*, the Court held that due process required that the defendant receive a change of venue "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury."[187] This implies that the presumption could not be rebutted by looking at the voir dire transcript for proof of actual prejudice.[188] Though the Eleventh Circuit conceded "[i]t might be argued that the threshold showing required to presume prejudice is so high that any rebuttal is inconceivable," both the Eleventh and Fifth Circuits ultimately disagreed with this interpretation of *Rideau* by concluding that the presumption could be rebutted.[189]

When a presumption of prejudice is found under the virtually impossible standard, it cannot be rebutted through proof of no actual prejudice because voir dire cannot perform its usual function of securing a fair and impartial jury in an environment where it has already been shown that it is virtually impossible for the defendant to receive a fair trial.[190] Even if jurors keep an open mind while viewing the evidence at trial, they will still be forced to return to a community eager for revenge, and it may be difficult for jurors not to give the community the guilty verdict that it is counting on.[191] In order to sit on such a high-profile case, jurors may also have an interest in concealing their bias.[192] During voir dire in *Skilling*, an

184. Irvin v. Dowd, 366 U.S. 717, 725 (1961).

185. *See id.*

186. *See Skilling*, 130 S. Ct. at 2948 (Sotomayor, J., concurring in part and dissenting in part).

187. Rideau v. Louisiana, 373 U.S. 723, 727 (1963).

188. *See id.*

189. Coleman v. Kemp, 778 F.2d 1487, 1541 n.25 (11th Cir. 1985) (stating that "We do not read *Rideau* to imply that the voir dire cannot rebut a presumption of prejudice"); Mayola v. Alabama, 623 F.2d 992, 1000 (5th Cir. 1980) (stating that *Rideau* "did not go so far as to indicate that voir dire had no role in the paradigm of presumptive prejudice").

190. *See Rideau*, 373 U.S. at 727.

191. *See Skilling*, 130 S. Ct. at 2957 (Sotomayor, J., concurring in part and dissenting in part). Juror 75 in *Skilling* recognized that "[i]t would be tough[] . . . to vote not guilty and go back into the community." *Id.* (internal quotation marks omitted). Another potential juror admitted "some hesitancy" about "telling people the government didn't prove its case." *Id.*

192. *See* Smith v. Phillips, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring); *Skilling*, 130 S. Ct. at 2947 (Sotomayor, J., concurring in part and dissenting in part) (detailing juror concealment in high profile cases).

individual who stated on his jury questionnaire that he had no bias toward the defendants luckily stated his desire for vengeance early on rather than continuing to conceal it by stating to the court, "[I] would dearly love to sit on this jury. I would love to claim responsibility . . . for putting these sons of bitches away for the rest of their lives."[193]

Serving on the jury of a high-profile trial where the defendants are despised can create a "hero effect," giving citizens the opportunity "to avenge their community and later boast to their friends and neighbors that they played a part in bringing the 'evildoers' to justice."[194] Others may even be unaware of the impact of negative media attention to their preconceptions of the case because as "part of a community deeply hostile to the accused, . . . they may unwittingly [be] influenced by [the fervor that surrounds them]."[195]

Psychologically, it is also difficult for a potential juror to declare that he could not be open-minded and fair as required by law to sit on a jury, especially to "an authority figure such as the trial judge in the black robe."[196] Admitting partiality is "tantamount to telling the entire world that one is close-minded and judgmental, that one has decided before hearing any facts, or that one has been influenced by what one has read or heard in the media."[197] In a venue where it is virtually impossible that a defendant will receive a fair trial, the typical safeguards such as voir dire can be ineffective—especially when the voir dire is too superficial to gain any insight on a potential juror's opinions based on media exposure.[198] But in a situation where the reasonable likelihood standard is applied, placing stricter requirements on the depth of voir dire, as proposed by this Comment in Part VI, could counteract many of the negative effects discussed.

V. SUPREME COURT'S MISSED OPPORTUNITY IN *SKILLING*

Given the splintering standard and its reliance on facts from 1960s cases, it seemed time for the Supreme Court to take a decisive stand on the future of the presumed prejudice standard.[199] The Court rarely entertains

193. *Skilling*, 130 S. Ct. at 2947 (Sotomayor, J., concurring in part and dissenting in part); *see also* Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 411 (1990) (noting that media exposure increases the likelihood that juror members will be pro-prosecution).

194. Farmer, *supra* note 167, at 8-9.

195. Murphy v. Florida, 421 U.S. 794, 803 (1975).

196. Farmer, *supra* note 167, at 8; *see* Irvin v. Dowd, 366 U.S. 717, 727 (1961) ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but [the] psychological impact requiring such a declaration before one's fellows is often its father."); Sophia R. Friedman, *Sixth Amendment—The Right to An Impartial Jury: How Extensive Must Voir Dire Questioning Be?*, 82 J. CRIM. L. & CRIMINOLOGY 920, 944-46 (1992).

197. Farmer, *supra* note 167, at 8.

198. *See* Friedman, *supra* note 196, at 940-41.

199. *See* Farmer, *supra* note 167, at 10.

the argument of a Sixth Amendment violation due to a presumption of prejudice, and "despite the proliferation of the news media and its technology, the Supreme Court has not found a single case of presumed prejudice in this country since the watershed case of *Sheppard*" in 1966.[200] Thus, legal practitioners were eager to ascertain why the Supreme Court agreed to hear this issue now and how the Court would handle the issue of juror prejudice in *Skilling*.[201] One white-collar criminal defense attorney stated that *Skilling* "presents an important opportunity for the Supreme Court to address definitively whether it is even realistic or practical to conduct voir dire after a finding of presumed prejudice of the entire community in which the case is to be tried."[202] Perhaps the Court would "examine whether the presumption should continue to be rebuttable," or "it may have accepted this issue for a more sweeping pronouncement of how prejudicial pretrial publicity cases are handled in the future."[203] In the end, the Court answered none of these questions, and they continue to puzzle legal practitioners.

A. Presumption of Prejudice in Skilling

Skilling's trial began four years after the shocking collapse of Enron, the seventh largest corporation in the United States, when anger towards the corporation's top executives still reverberated throughout the City of Houston.[204] Though Enron was internationally prominent, most Houstonians identified Enron with their city—the place of its founding and headquarters.[205] Enron provided a source of pride for Houstonians, as well as a stimulus to the local economy.[206] When the company descended into bankruptcy, thousands lost their jobs and savings, and local businesses and communities lost important monetary contributions.[207] Enron's community ties ran so deep that the "entire local U.S. Attorney's Office was forced to

200. United States v. McVeigh, 153 F.3d 1166, 1182 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1148 (1999); *see* Mu'Min v. Virginia, 500 U.S. 415, 428-29 (1991); Patton v. Yount, 467 U.S. 1025, 1040 (1984).

201. *See, e.g.*, Farmer, *supra* note 167, at 9. "Thus, *Skilling* presents two related tantalizing questions: why did the Supreme Court agree to consider the issue of juror prejudice, and, given that they did so agree, how will they treat the issue?" *Id.*

202. *Id.* at 7.

203. *Id.* at 9.

204. Skilling v. United States, 130 S. Ct. 2896, 2942-45 (2010) (Sotomayor, J., concurring in part and dissenting in part).

205. *Id.* at 2907 (majority opinion).

206. *Id.* at 2942 (Sotomayor, J., concurring in part and dissenting in part).

207. *Id.* Due to Houston's "interconnected economy," Enron's bankruptcy affected many other industries: "Accounting firms that serviced Enron's books had less work, hotels had more open rooms, restaurants sold fewer meals, and so on." United States v. Skilling, 554 F.3d 529, 560 (5th Cir. 2009).

recuse itself from the Government's investigation into the company's fall."[208]

Because of the community's widespread outrage toward Enron's top executives—the presumed perpetrators of this tragedy—defense counsel moved for a change in trial venue.[209] The court denied the motion, stating that the "facts of the case were neither heinous nor sensational" and that "media coverage ha[d] [mostly] been objective and unemotional."[210] The defense renewed this motion when co-defendant Richard Causey, Enron's Chief Accounting Officer, pleaded guilty just three weeks before trial and after the jury questionnaires were submitted.[211] This news was prejudicial against Skilling because prospective jurors might consider the remaining defendants guilty by association based on a co-defendant's guilty plea.[212] Again, the court denied the motion due to the court's determination that voir dire would ensure an impartial jury.[213]

Voir dire was completed in five hours and did not appear to probe past the surface of the venire's media exposure.[214] The court made it clear that it was conducting voir dire and gave defense counsel limited opportunity to ask follow-up questions by "twice chastising defense counsel for asking too many questions about potential prejudice because the court had prohibited 'individual voir dire.'"[215] Based on the vitriolic responses from the jury questionnaires and a cursory voir dire, it is no surprise that on the eve of trial a *USA Today* headline warned: "If Juror No. 11 is any indication: Look out, defense."[216] After his convictions for conspiracy, securities fraud, making false representations to auditors, and insider trading, Skilling argued on appeal that the court denied him the right to a fair trial based on a presumption of prejudice—the jury pool in Houston was so tainted against Skilling that a change in venue was necessary.[217] Skilling also argued that

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208. *Skilling*, 130 S. Ct. at 2942 (Sotomayor, J., concurring in part and dissenting in part).

209. *Id.* at 2907 (majority opinion).

210. *Id.* (alteration in original).

211. *Id.* at 2946 (Sotomayor, J., concurring in part and dissenting in part).

212. *Id.* at 2952. A *Houston Chronicle* editorial wrote, "Causey's admission of securities fraud . . . makes less plausible Lay's claim that most of the guilty pleas were the result of prosecutorial pressure rather than actual wrongdoing." *Id.* at 2946.

213. *Id.* at 2910 (majority opinion).

214. *Id.* at 2918. "As the majority recounts, the court asked them a few general yes/no questions about their exposure to Enron-related news, often variations of, 'Do you recall any particular articles that stand out that you've read about the case?'" *Id.* at 2947 (Sotomayor, J., concurring in part and dissenting in part) (citation omitted).

215. Brief for Petitioner, *supra* note 1, at 10; *see also Skilling*, 130 S. Ct. at 2947 (Sotomayor, J., concurring in part and dissenting in part) (admitting that "[t]he court made clear, however, that its patience would be limited, . . . and questioning tended to be brief—generally less than five minutes per person").

216. Brief for Petitioner, *supra* note 1, at 15. When asked whether defendants would have to change his mind that Skilling was greedy, Juror 11 responded, "I don't hardly know how you could do that." *Id.* at 16. The court denied defendant's motion to remove Juror #11 for cause, and Juror #11 was seated on the panel. *Id.*

217. *See Skilling*, 130 S. Ct. at 2911-12.

actual prejudice contaminated the jury, resulting in an unfair conviction.[218] While the Fifth Circuit agreed with Skilling in determining that there was a presumption of prejudice in Houston, it held that the Government's demonstration that no actual prejudice infected the jury rebutted this presumption.[219]

The Supreme Court held that Skilling received a fair trial based on its finding that no presumed or actual prejudice existed, but it left many questions unanswered regarding the future of the presumption of prejudice standard.[220] The Court decided that while "[i]t would not have been imprudent for the [District] [C]ourt to have granted Skilling's transfer motion," there was no manifest error in its conclusion of juror impartiality.[221] In addition to not finding actual prejudice, the Court concluded that no presumption of prejudice arose in *Skilling* by comparing the circumstances surrounding the Enron trial to those in *Rideau* and *Irvin*.[222] The opinion confirmed that a comparison of the current facts of a case to the facts from the 1960s cases would continue to be the Court's basis for finding a presumption of prejudice, even in the twenty-first century.[223]

The Court based its decision on several differences that distinguished the facts in *Skilling* from those extreme circumstances in which the Court has previously found a presumption of prejudice.[224] First, the size of Houston, in contrast to the small communities in *Rideau* and *Irvin*, made it much more likely that finding twelve impartial jurors was not impossible.[225] Furthermore, "Houston's size and diversity diluted the media's impact."[226] Second, the news stories surrounding Skilling's trial, while unkind, did not include any "blatantly prejudicial information" such as "Rideau's dramatically staged admission of guilt" or anything "resembling the horrifying information rife in reports about Irvin's rampage of robberies and murders."[227] Finally, the Court concluded that because the jury acquitted Skilling of nine counts of insider trading, it was unlikely that any prejudice affected the panel.[228] Apparently, if the jury was actually biased, it would have found Skilling guilty on all counts.

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218. *See* United States v. Skilling, 554 F.3d 529, 557 (5th Cir. 2009).
219. *Id.* at 558.
220. *See Skilling*, 130 S. Ct. at 2916-25.
221. *Id.* at 2953 n.9 (Sotomayor, J., concurring in part and dissenting in part) (alterations in original) (quoting *Skilling*, 554 F.3d at 558).
222. *See id.* at 2915-16 (majority opinion).
223. *See id.* at 2916, 2921.
224. *Id.* at 2915.
225. *Id.*
226. *Id.* at 2916.
227. *Id.* at 2916, 2922.
228. *See id.* at 2916.

B. Problems with the Standard in Light of Skilling*: It Is Narrow and Outdated*

One of the problems of the facts in the *Irvin–Rideau–Estes* line of cases is that it requires a guilty confession or similar "smoking gun" in order to prove that the community was presumed prejudiced against the defendant.[229] The Court in *Skilling* recognized this by stating that "no evidence of the smoking-gun variety invited prejudgment of [Skilling's] culpability."[230] This reasoning suggests that because Skilling did not announce his guilt—even though many media outlets published its assumptions of his guilt and co-defendant Causey pleaded guilty prior to trial—Skilling did not deserve a change in venue.[231]

This narrow standard ironically makes it very difficult for those defendants who have a colorable defense—and who would therefore benefit most from a change of venue—to obtain a change in venue by arguing there is a presumption of prejudice in the community. These defendants are simply out of luck because it is difficult for their case to meet the nearly impossible standard set forth in *Irvin–Rideau–Estes*, and they must brave the judicial system in an arguably prejudicial community. Conversely, it is easier for defendants who do not have a colorable defense because they have already admitted guilt—and who therefore have the least to gain—to change venue. While it is justifiable to set a high standard on the presumption of prejudice so that it only applies in unique circumstances, when the standard is so narrow that it deprives a defendant of his constitutional rights, a change is warranted.

The Supreme Court bases its test on facts from cases with extremely outdated media technology.[232] The standard focuses on cases from the 1960s, when only a few television channels and newspapers were available in most communities.[233] In 1961, the Court in *Irvin* justified the presumption of prejudice concept by pointing out that prejudicial information about a defendant could be spread rapidly through the community by new technology.[234] The Court described the technology of the time as "these days of swift, widespread and diverse methods of communication," which is amusing to consider in today's world of instant communication and access to media.[235]

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229. *See id.* at 2916, 2921.

230. *Id.* at 2916.

231. *Id.* at 2952 (Sotomayor, J., concurring in part and dissenting in part).

232. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 537 (1965) (describing the courtroom media as "newsreel photographers"); Rideau v. Louisiana, 373 U.S. 723, 724 (1963) (describing the media as "a moving picture film with a sound track").

233. *See* cases cited *supra* note 232.

234. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

235. *Id.*

Because the Court continues to compare current cases to facts involving technology from the 1960s, it is less likely that future cases will comport with the scenarios found in *Rideau* or *Estes*, in which local newspapers or a broadcast on one basic channel are viewed by a majority of the community.[236] Today, anyone can gain immediate access to information, and disinformation, about someone involved in a high-profile trial. With the advent of blogging and social media websites, there is a multitude of various opinions and interpretations of current events that could shape opinions about a person involved in a popular trial.

There was no mention in *Skilling* of the impact of blogs, social networking sites, and other forms of instant communication in which anyone around the world can make their opinion known in seconds.[237] Even columns in mainstream news sources, primarily the *Houston Chronicle*, contributed to the media frenzy before and during trial, including live courtroom blogging.[238] Disturbingly, the *Chronicle*'s website publicized the evidence that was ruled inadmissible at trial, telling readers that "it's worth remembering what the defense doesn't want the jury to hear."[239] Bloggers also made warnings, presumably to the jurors, to "not be drawn in by [defendants'] circular arguments and seductive logic"[240] and referred to the defense's strategy as "the doofus defense."[241]

Today's technology makes it even more difficult to ensure that potential jurors will be fair and impartial, and courts should consider the effect of this new media. In *Sheppard*, the Court noted the trial court's responsibility to protect the defendant by stating, "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."[242] This statement puts the onus on the trial courts to ensure that remedial measures, such as a thorough voir dire, are properly conducted.[243] During voir dire, practitioners should explore and consider a potential juror's habits online, such as if they were exposed to any information about the defendant via social media networks or blogs. Judges also need to ensure that potential jurors are fully aware of what information they can and

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236. *See Estes*, 381 U.S. at 537; *Rideau*, 373 U.S. at 724; Thomas Beisecker, *The Role of Change of Venue In An Electronic Age*, 4 KAN. J.L. & PUB. POL'Y 81, 85 (1995) (noting that "[w]hat in earlier years would have been considered inflammatory is now part of the ten o'clock news").

237. *See* Skilling v. United States, 130 S. Ct. 2896 (2010).

238. *Id.* at 2943 (Sotomayor, J., concurring in part and dissenting in part).

239. Brief for Petitioner, *supra* note 1, at 17.

240. Loren Steffy, *Enron's Philosophy of Lies is What's on Trial Here*, HOUS. CHRON. (Feb. 1, 2006), http://www.chron.com/business/steffy/article/Enron-s-philosophy-of-lies-is-what-s-on-trial-here-1867647.php. Despite a disclaimer at the top of the article that jurors should not be reading the blog, Steffy writes, "if I could pass on some advice [to the jury], it would be as follows . . . ." *Id.*

241. *Skilling*, 130 S. Ct. at 2944 (Sotomayor, J., concurring in part and dissenting in part).

242. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

243. *See id.*

cannot consider in determining the outcome of a case and the consequences of disobeying this order.[244] Considering the allure of sitting on the jury of a high-profile trial, jurors might be tempted to put themselves in the spotlight by publicizing their role in the case. Already there have been instances in which a juror has tweeted the outcome of a case before the verdict was announced. For example, in *Dimas-Martinez v. Arkansas*, the Supreme Court of Arkansas reversed and remanded a murder conviction due to a juror's mid-trial tweets, such as the tweet "It's over" before the verdict was announced.[245] At trial, defense counsel notified the court of the tweets, but the court did not dismiss the juror.[246] The Third Court of Appeals recognized the danger of jurors posting to social media websites by stating:

> If anything, the risk of such prejudicial communication may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger.[247]

An issue that may arise due to modern technology, which does not restrict media coverage to one specific region, is whether or not *any* venue nationwide is immune to pretrial publicity affecting the jury pool. Particularly in high-profile celebrity cases, individuals across the United States may be eager to learn more about the details of the crime and the individuals involved. In cases such as *Skilling*, where the alleged crimes greatly affected one particular city, Houston, more than any other part of the country, it is reasonable that a more impartial venue does exist—despite nationwide negative publicity about the defendant.[248]

Enron's collapse had a specific and personal impact on Houstonians.[249] Of the twelve jurors actually seated in *Skilling*, "four knew former Enron employees who lost [their] savings[,] . . . [and] one believed he might own Enron stock."[250] It is unlikely that citizens of other cities were so directly affected by Enron, nor would they have to return to a city where so many were hopeful for a guilty verdict.[251] For example, defense counsel

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244. *See* Joyce E. Cutler, *User-Generated Content: Judges, Lawyers Say Twitter, Blogs Raise Issues in Defining Courtroom 'Journalists*,*'* 14 ELECTRONIC COMMERCE & L. REP. (BNA) 1627 (Nov. 11 2009). "The warning not to read anything in the newspaper 'is now the beginning of a very long paragraph of things they're not supposed to be doing' that includes telling them not to blog or Twitter or search the internet to research the case." *Id.*

245. Dimas-Martinez v. State, 2011 Ark. 515, at *1 (2011).

246. *Id.* at *12-13.

247. United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011).

248. *See* Skilling v. United States, 130 S. Ct. 2896, 2942-44 (2010) (Sotomayor, J., concurring in part and dissenting in part).

249. *Id.* at 2942.

250. Brief for Petitioner, *supra* note 1, at 13.

251. *Skilling*, 130 S. Ct. at 2957 (Sotomayor, J., concurring in part and dissenting in part).

suggested Denver, Atlanta, and New Orleans as appropriate places to transfer venue.[252]

It is possible that in the future there could be a situation in which a high-profile crime is not so closely linked to a particular region, and its pretrial publicity has a national impact.[253] In that situation, it seems an especially intensive and heavily scrutinized voir dire would be the most effective tool in discovering bias amongst the potential jurors. In cases like this, in which a transfer of venue would not solve the problem, the solution may be, as Justice Sotomayor proposed, the development of constitutional standards for conducting suitable voir dire and a separate due process violation for improper voir dire.[254]

C. Justice Sotomayor Proposes Separate Due Process Violation Based on Inadequate Voir Dire

While Justice Sotomayor concurred in the majority's opinion regarding honest services fraud, she strongly dissented from the Court's conclusion that Skilling received a fair trial. In her dissent, she put forth the possible solution that even when the facts of the case are not sufficient to meet the presumption of prejudice, there could still be a separate due process violation for inadequate voir dire.[255] Her opinion, joined by Justices Stevens and Breyer, focused on her concern with the adequacy of the district court's voir dire.[256] It is interesting to note that Sotomayor is the only justice on the Court with experience as a trial court judge and has routinely presided over voir dire.[257]

While Sotomayor disagreed with the characterization of the media surrounding Skilling as "largely 'objective and unemotional,'" she did agree with the majority that "the prospect of seating an unbiased jury in Houston was not so remote as to compel the conclusion that the District Court acted unconstitutionally in denying Skilling's motion to change venue."[258] Admitting it was a close question, she based her conclusion on the size and diversity of Houston and the fact that there was no "confession by Skilling or similar 'smoking-gun' evidence of specific criminal acts."[259]

Despite agreeing with the majority that no presumption of prejudice arose and a change of venue was not required, Sotomayor concluded that

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252. *See* Brief for Petitioner, *supra* note 1, at 25.

253. *See* Beisecker, *supra* note 236, at 85 (stating "[t]he implication is that mass media publicity has potentially biased any jurisdiction where such defendants might be tried").

254. *See Skilling*, 130 S. Ct. at 2942 (Sotomayor, J., concurring in part and dissenting in part).

255. *See id.*

256. *See id.* at 2963.

257. Robert W. Pratt, *A Trial Judge on the Supreme Court*, 23 FED. SENT'G REP. 159, 159, 161 (2010).

258. *Skilling*, 130 S. Ct. at 2944, 2952 (Sotomayor, J., concurring in part and dissenting in part).

259. *Id.*

Skilling did not receive a fair trial due to insufficient voir dire.[260] Sotomayor recognized the trial court's wide discretion over voir dire yet insisted that appellate courts must "inquire into whether a trial court implemented procedures adequate to keep community prejudices from infecting the jury."[261] The circumstances surrounding Skilling's trial, despite not reaching the threshold required for a change of venue, still warranted an extremely thorough voir dire where possible juror's responses were intensely scrutinized.[262] While there was no identifiable actual prejudice to point to, Sotomayor believed it was "highly likely that at least some of the seated jurors, despite stating that they could be fair, harbored similar biases that a more probing inquiry would likely have exposed."[263] Thus, Sotomayor puts forth the idea that even when there is no presumption of prejudice or actual prejudice found, a defendant can argue that the trial did not meet the minimum constitutional standards based on voir dire alone.[264]

Putting safeguards on voir dire in high-profile cases involving prejudicial pretrial publicity is a practical solution. Unfortunately, it may be difficult to implement; the Court has been unwilling to dictate regulations to matters that the district courts exercise broad discretion over in the past.[265] Based on this discretion, appellate courts can only reverse for manifest error, which is a high burden to meet.[266] The Court routinely defers voir dire issues to the district court judge because the judge's decision might have been "influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty."[267] In addition, judges are located in the district where the pretrial publicity occurs, so they can also assess the amount of time necessary to discuss the media's impact on potential jurors during voir dire.[268]

The Supreme Court considered implementing stricter voir dire questioning in its 5–4 decision in *Mu'Min v. Virginia*, a case involving an inmate serving time for murder who committed another killing while out on work detail.[269] During group voir dire, eight of the twelve jurors who ultimately convicted Mu'Min admitted that they were exposed to pretrial

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260. *Id.* at 2963.
261. *Id.* at 2953.
262. *See id.* at 2956.
263. *Id.* at 2962.
264. *See id.*
265. *See* Mu'Min v. Virginia, 500 U.S. 415, 431-32 (1991).
266. *See id.* at 428.
267. *Skilling*, 130 S. Ct. at 2918.
268. *See id.* Though Justice Marshall notes that "[t]he judge's awareness of the contents of the extraordinarily prejudicial stories . . . is not a substitute for knowledge of whether the *prospective jurors* were aware of the content of these stories." *Mu'Min*, 500 U.S. at 445 (Marshall, J., dissenting).
269. *Mu'Min*, 500 U.S. at 417-18.

publicity regarding both murders.[270] Mu'Min argued that the trial judge's refusal to ask prospective jurors about the specific content of the media they were exposed to violated his Sixth Amendment right as well as his right to due process.[271]

The Court held that "content" questions are not constitutionally required unless the failure to ask such questions would cause the defendant's trial to be fundamentally unfair.[272] While such questions would be helpful in determining the partiality of prospective jurors, helpfulness alone does not make these questions required by the Constitution.[273] According to the Court, the trial court must only determine whether or not a potential juror can be impartial.[274] Typically all this involves is a yes or no question in which the potential juror almost always confirms that he has the ability to be fair. One judge acknowledged that "[t]his methodology is a little like asking a practicing alcoholic if he has his drinking under control; we are asking the person who has the prejudice to determine if the prejudice will affect his decision."[275] This holding is problematic because the defense is prohibited from determining the extent of the potential juror's bias based on her media exposure and is forced to make a decision on that juror with little information.[276] The petitioner bears the burden of demonstrating juror prejudice, which will be difficult to accomplish with a superficial record from voir dire. In his dissent, Justice Marshall acknowledged that "[t]oday's decision turns a critical constitutional guarantee—the Sixth Amendment's right to an impartial jury—into a hollow formality."[277]

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270. *Id.* at 434 (Marshall, J., dissenting). The newspaper reported that Mu'Min had confessed to the crime with headlines such as, "Murderer confesses to killing woman," and "Inmate Said to Admit to Killing." *Id.* at 436. Local officials also published their presumption of Mu'Min's guilt: "The local Congressman announced that he was 'deeply distressed by news that my constituent Gladys Nopwasky was murdered by a convicted murderer serving in a highway department work program' and demanded an explanation of the 'decisions that allowed a person like Dawud Mu'Min to commit murder.'" *Id.* at 438.

271. *See id.* at 419, 424 (majority opinion).

272. *Id.* at 422. The Court does not clarify what "fundamentally unfair" entails. The Court cited *Murphy v. Florida* for this proposition, presumably for the statement: "To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair." Murphy v. Florida, 421 U.S. 794, 799 (1975). Yet, this does not really explain what types of questions during voir dire would render a trial fundamentally unfair.

273. *Mu'Min*, 500 U.S. at 425-26.

274. *Id.* at 422.

275. Judge Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 183 (1988).

276. *But see* Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting The Criminal Defendant's Rights in A Highly Publicized Trial by Applying the* Sheppard-Mu'Min *Remedy*, 69 S. CAL. L. REV. 1587, 1612 (1996) (arguing that "[u]nless the *Mu'Min* standard is adopted, it will be nearly impossible to find jurors who have not been influenced in some way by the reports generated by high-profile cases").

277. *Mu'Min*, 500 U.S. at 433 (Marshall, J., dissenting).

VI. PROPOSED SOLUTION

The Supreme Court cannot continue to avoid the problems inherent with the conflicting presumption of prejudice standards. High-profile trials that generate virulent media publicity and incite community sentiment against the defendant will continue to present venue challenges. Particularly with the new age of media technology, the current presumption of prejudice framework is outdated and cannot effectively protect defendants from a biased jury. The proposed solution (1) lowers the threshold for finding a presumption of prejudice to the reasonable likelihood standard, (2) places requirements on voir dire to ensure a thorough and searching process, and only if there is satisfactory voir dire, and (3) allows the government to rebut the presumption by showing there was no actual prejudice within the jury based on the totality of the circumstances.

A. Application of the Reasonable Likelihood Standard

As set forth in Part III, the reasonable likelihood standard best ensures that a defendant will not be deprived of her constitutional right to a fair trial.[278] Therefore, the first step in the analysis is considering whether there is a reasonable likelihood that a defendant cannot receive a fair trial in the current venue. Issues that should be considered are how damning and pervasive the media coverage is and the frequency of exposure prior to trial. All aspects of media technology, including social networking sites and blogs, should be given attention to determine the community's perception of the defendant.

Another factor is the size of the community and the impact of the defendant's alleged actions on that community. The majority, and even dissent, in *Skilling* considered Houston's size and diversity as one of the main reasons why a venue transfer was unnecessary.[279] Yet holding the trial in a large metropolis, where it is generally realistic that twelve impartial jurors can be found out of millions, should not be a dispositive factor in favor of a fair venue. In a large community, a desire for revenge can be just as great as in a small community. Particularly in cases involving white-collar crime, the victims and those affected by the crimes span much further than other crimes, such as murder. If a large majority of the population is prejudiced against the defendant, the defense does not have the same opportunity as the prosecution to choose potentially favorable jurors. The impaneled jurors may not be actually biased, but after exercising its peremptory strikes, the defense may have to settle for twelve

278. *See supra* Part III.D.

279. *See* Skilling v. United States, 130 S. Ct. 2896, 2915, 2952 (2010).

"D-rated" jurors rather than twelve "F-rated" jurors. The prosecution, on the other hand, may have all "A-rated" jurors. The result would not be a fair trial.

B. Allow Government to Rebut by Raising Voir Dire Requirements

Even if a reasonable likelihood of prejudice has been shown, this Comment proposes that the prosecution have an opportunity to rebut the presumption by showing no actual prejudice—only if the voir dire is conducted in compliance with proposed higher safeguards to ensure that any hidden prejudices are exposed. As the Second Circuit noted, "the key to determining the appropriateness of a change of venue is a searching voir dire."[280] The current minimal voir dire standard set out in *Mu'Min* is not a proper rebuttal to presumed prejudice because it does not investigate any opinions or biases based on the media exposure.[281] Currently, all the prosecution has to ask is whether or not the juror could be impartial, and if she answers in the affirmative, the presumption is effectively rebutted.[282]

This step endorses Justice Sotomayor's suggestions but incorporates it into the presumption of prejudice analysis rather than making it a separate due process violation. The court should focus on the totality of the circumstances before and during voir dire in determining whether or not the Government has effectively rebutted the presumption of prejudice.

An important part of reforming voir dire in cases where there may be a presumption of prejudice is by taking statements of partiality by potential jurors seriously. In *Skilling*, there were multiple instances of District Court Judge Lake denying the defendants' cause challenges when potential jurors gave unequivocal answers as to their impartiality.[283] For example, Juror #101 noted on her questionnaire that she was "unsure" that she could be impartial toward Skilling.[284] At voir dire the court asked her twice whether she could base her decision on the facts heard in court.[285] She responded "possibly" and then elevated this answer to "probably."[286] For some reason, the court was not satisfied with these answers and yet again asked, "[c]an you in your heart of hearts assure us that you will base your decision on what you hear in this courtroom?"[287] It seems she "got the message" after

280. United States v. Yousef, 327 F.3d 56, 155 (2d Cir. 2003) (citing United States v. Gaggi, 811 F.2d 47, 51 (2d Cir. 1987)).

281. *See supra* notes 269-79 and accompanying text.

282. *See supra* notes 274-77 and accompanying text.

283. *See* Brief for Petitioner, *supra* note 1, at 11-12.

284. *Id.* at 12.

285. *Id.*

286. *Id.*

287. *Id.*

at last agreeing that she would be fair.[288] Defendants' challenge for cause was denied.[289] It is necessary to follow the reasoning of *Irvin,* which stated that while the Court did not "doubt [that] each juror was sincere when he said that he would be fair and impartial to [Irvin], but . . . [w]here so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight."[290] When a potential juror has already stated her opinions of partiality against a defendant, a subsequent promise to be impartial should not be accepted, and that individual should be dismissed.

This requirement will effectively overrule the holding in *Mu'Min* by requiring more than a juror's simple statement of impartiality to prove that the juror is in fact impartial. In his dissent in *Mu'Min*, Justice Marshall reasoned that when a case involves such a high level of pretrial publicity, "a trial court cannot realistically assess the juror's impartiality without first establishing what the juror already has learned about the case."[291] Marshall argued that when a juror admits to viewing pretrial publicity, voir dire must include content-specific questioning for three reasons: (1) it is necessary to determine whether the type and extent of the publicity viewed by the juror would disqualify him as a matter of law; (2) even when pretrial publicity is not great enough to be "*per se* disqualifying, content questioning still is essential to give legal depth to the trial court's finding of impartiality[;]" and (3) "content questioning facilitates accurate trial court factfinding."[292] For all of these reasons, content questioning should be encouraged rather than denied.

The next requirement that should be enforced is allowing counsel to lead individual voir dire outside the presence of other jurors and away from the potential circus atmosphere of a high-profile trial. Individual questioning by counsel in a less formal setting—such as the judge's chambers or a conference room—and away from the media will facilitate a less intimidating discussion. When the trial judge leads voir dire it "often inhibits juror candor" because "[t]he judge's questions may even lock jurors into their 'good-citizen' responses, thus preventing later questions by the attorneys from uncovering the jurors' real feelings."[293] The court must

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288. *Id.* In Justice Marshall's dissent in *Mu'Min* he noted, "When a prospective juror admits exposure to pretrial publicity, the juror's assertion of impartiality, on its own, is insufficient to establish his impartiality for constitutional purposes. I do not see how the juror's assertion of impartiality becomes any more sufficient merely through repetition." Mu'Min v. Virginia, 500 U.S. 415, 445 (1991) (Marshall, J., dissenting).

288. *See* Brief for Petitioner, *supra* note 1, at 12.

289. *Id.*

290. Irvin v. Dowd, 366 U.S. 717, 728 (1961).

291. *Mu'Min*, 500 U.S. at 434 (Marshall, J., dissenting).

292. *Id.* at 441-45.

293. Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 653 (1991) ("Limiting the power to question jurors to the judge also may not adequately protect the defendant's [S]ixth [A]mendment rights; in fact, it may increase the ineffectiveness of voir dire.").

provide a fair and full opportunity for counsel to ask follow-up questions and ask specific questions regarding the extent of the potential juror's media exposure and opinions of the defendant.[294] Defense counsel should additionally inquire about the potential juror's ability to stand up to community sentiment upon her return. The district court in *Skilling* reflected this concern by announcing to potential jurors that "it would take courage" for them to acquit—but the court did not allow counsel to inquire about their ability to do so.[295]

A concern is that putting strict requirements on voir dire would burden the trial courts by unnecessarily lengthening the amount of time spent on voir dire.[296] These voir dire requirements, however, would only be triggered by a case that meets the reasonable likelihood threshold—a small percentage of any district court docket.[297] Additionally, the Court has already allowed more searching voir dire when questioning jurors regarding racial or religious prejudice.[298] In weighing the policy reasons, Justice Marshall noted that "it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred."[299]

If voir dire is conducted according to these more stringent standards, and the prosecution can demonstrate no actual prejudice, then the district court would not violate the defendant's constitutional right by declining to transfer venue.

VII. CONCLUSION

The Supreme Court's current application of a presumption of prejudice standard puts a criminal defendant's right to a fair trial in jeopardy because it is ineffective and outdated. *Skilling* provides a primary example of why continuing to compare pretrial publicity from 1960s cases does not translate to today's media technology. Until the Court makes a definitive ruling on what standard should be applied, the confusion amongst the federal courts will continue. Though the Supreme Court missed an opportunity to fix the presumption of prejudice standard in *Skilling*, the opportunity will likely

294. *See id.* at 632 ("Potential jurors may arrive at the courthouse on the first day of the trial with extensive knowledge about the victim, the crime, and the defendant, including inaccurate or influential information which may, for evidentiary or strategic purposes, never be introduced in court.").

295. Brief for Petitioner, *supra* note 1, at 9.

296. *Mu'Min*, 500 U.S. at 446 (Marshall, J., dissenting).

297. *See* discussion *supra* Part III.D.

298. *See* Ham v. South Carolina, 409 U.S. 524, 527 (1973) (holding that refusal to question potential jurors on racial bias violated the essential fairness requirement of due process); Aldridge v. United States, 283 U.S. 308, 315 (1931) (reversing a murder conviction because the trial court refused to allow questioning during voir dire about potential juror's racial bias).

299. *Mu'Min*, 500 U.S. at 446 (Marshall, J., dissenting) (quoting *Aldridge*, 283 U.S. at 314-15).

present itself again. Hopefully then the Court will abandon its reliance on a broken framework and fashion an approach that is better adapted to the twenty-first century, as well as properly balance a defendant's right to a fair trial with other constitutional concerns.