No. 21-340

In the Supreme Court of the United States

ORLANDO CARTER, PETITIONER

v.

DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
JOSHUA K. HANDELL
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's Sixth Amendment right to an impartial jury was violated when the District of Columbia Superior Court declined to transfer his trial to a federal court in another judicial district, notwithstanding the uncontested determination that the court had been able to impanel impartial jurors.

ADDITIONAL RELATED PROCEEDINGS

Superior Court of the District of Columbia:

United States v. *Carter*, No. 2010-CF1-5677 (Oct. 9, 2012)

District of Columbia Court of Appeals:

Carter v. *United States*, No. 12-CF-1699 (Feb. 15, 2018)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 21-340

ORLANDO CARTER, PETITIONER

v.

DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-98a) is reported at 178 A.3d 1156.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2018. A petition for rehearing en banc was denied on April 7, 2021 (Pet. App. 99a-101a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on September 1, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted of 50 crimes under District of Columbia law, including five counts of first-degree murder. Judgment 1-10. Petitioner was sentenced to five terms of life imprisonment without release, along with several lesser terms of confinement. *Ibid.* The District of Columbia Court of Appeals affirmed. Pet. App. 1a-98a.

1. Over the course of eight days in late March 2010, petitioner and several co-conspirators engaged in three shootings and related crimes in the District of Columbia. Pet. App. 1a-2a. Their spate of violence originated with a dispute over a missing bracelet at a party and culminated in a drive-by attack at a memorial gathering for one of their victims. *Id.* at 2a. In total, petitioner's and his co-conspirators' criminal conduct left five people dead and another eight injured. *Ibid.*

a. On March 21, 2010, petitioner's brother Sanquan Carter (for clarity, Sanquan) attended a house party at 1333 Alabama Avenue S.E. in the District of Columbia. Pet. App. 4a; see *id.* at 1a n.1. During the evening, Sanquan showed off a fake diamond bracelet to several other attendees, including Jordan Howe. *Id.* at 4a. After the party, Sanquan realized that his bracelet had been stolen. *Ibid.* Suspecting that Howe had taken the bracelet, Sanquan and another man went to Howe's apartment to confront him, but Howe denied any knowledge of the theft. *Ibid.* Sanquan then called petitioner to report what had happened and told petitioner to "bring everything." *Ibid.*

When Sanquan called, petitioner was in the company of his friend Nathaniel Simms. Pet. App. 4a-5a. After the call ended, petitioner and Simms proceeded to the

home of petitioner's godmother, where petitioner retrieved his AK-47 rifle. *Id.* at 5a. Petitioner and Simms then picked up another of petitioner's friends, Jeffrey Best, and the three traveled to the home of a fourth friend, Lamar Williams, who provided them with a .380-caliber pistol and a shotgun. *Ibid.* Now equipped with three firearms, petitioner, Simms, and Best went to Alabama Avenue to meet up with Sanquan. *Ibid.*

The trio arrived to find Sanquan and several other individuals standing in front of the apartment building where the party had occurred earlier that night. Pet. App. 5a. Sanquan took the .380-caliber pistol from Simms (who remained waiting in the car) and brandished it outside the building, while petitioner brandished the AK-47 and Best held the shotgun. *Id.* at 5a-6a. Sanquan proceeded to hold the crowd at gunpoint while he patted down each individual and demanded return of his bracelet. *Id.* at 6a. When one person refused to be patted down, Sanquan turned to petitioner, who asked Sanquan if petitioner and his friends should "[g]o ham"—a slang term for opening fire. *Ibid.* Sanquan assented, and the three men began shooting indiscriminately into the crowd. *Ibid.* A stray bullet struck and killed Howe, who was sitting in a nearby car, and injured two others. *Ibid.*

b. On learning of his death, Howe's friends vowed revenge against petitioner and Sanquan. Pet. App. 6a. Two days later, on March 23, 2010, Howe's half-brother Marquis Hicks went up to petitioner on the street and shot him twice, grazing petitioner's head and lodging a bullet in his shoulder. *Id.* at 7a.

The next day, petitioner told Simms and Best that he believed his shooter was one of Howe's friends and that he wanted to exact retribution at Howe's upcoming

funeral. Pet. App. 8a. Petitioner and his associates prepared for their retaliation by obtaining a 9mm pistol, a .45-caliber pistol, and two boxes of ammunition, and having petitioner's godmother rent a minivan. *Ibid.*

On the evening of March 30, 2010, petitioner, Simms, Best, and Robert Bost (another of petitioner's friends) gathered to execute the plan. Pet. App. 8a. Because the quartet had only three weapons—the 9mm pistol, the .45-caliber pistol, and petitioner's AK-47—among them, petitioner drove to an apartment complex to rob Tavon Nelson, a man whom petitioner knew to carry a gun. *Id.* at 8a-9a. At petitioner's direction, Best and Bost entered Nelson's apartment complex masked and armed with the two pistols. *Id.* at 9a. A shootout ensued, during which Nelson was killed. *Ibid.* Best and Bost returned to the minivan, and the group fled the scene without obtaining Nelson's gun. *Ibid.*

Petitioner, Simms, Best, and Bost next drove to the 4000 block of South Capitol Street, where Howe's friends had gathered in a front yard following his funeral. Pet. App. 9a. Petitioner instructed his associates to "have the[] guns hanging out the window" when he "pull[ed] over." *Ibid.* As petitioner drove along the street facing the yard, Simms, Best, and Bost blanketed the assembled mourners with bullets. *Ibid.* Responding police officers later reported that they found dying and injured victims "piled up on top of each other" at the scene. *Id.* at 10a. Three of the mourners went on to die from their injuries; of the six injured persons who survived, one sustained a severe brain injury. *Ibid.*

Following the shooting, two police officers spotted the minivan and recognized that it matched a description of the vehicle seen leaving Nelson's apartment complex earlier that evening. Pet. App. 9a-10a. As the

police officers pursued, Simms threw the AK-47 out the window. *Id.* at 10a. Petitioner then rammed a police car, and the minivan's occupants jumped out and fled in different directions. *Ibid.* All four were soon apprehended and placed under arrest. *Ibid.*

2. A grand jury in the District of Columbia returned a superseding indictment charging petitioner, Sanquan, Simms, Best, Bost, and Williams with 54 counts stemming from their involvement in the March 21 and 30 conspiracies. Superseding Indictment 1-34. As relevant here, the grand jury charged petitioner with 50 violations of District of Columbia criminal law, including five counts of first-degree murder, numerous firearms-related offenses, assault with intent to kill, assaulting a police officer, and attempted robbery. *Ibid.* Simms's case was severed from the others after he agreed to testify as a witness for the government pursuant to a plea deal. Pet. App. 11a n.7. Petitioner and his four remaining co-defendants proceeded to a jury trial.

Petitioner subsequently moved for a change of venue. Pet. App. 16a. Claiming that "pervasive and irremediable adverse local pretrial publicity" surrounding his alleged involvement in the South Capitol Street shooting made it impossible for him to receive a fair trial in the District of Columbia, he requested that his case be transferred to a federal district court in another jurisdiction. *Ibid.*

The superior court denied petitioner's motion. Pet. App. 17a. The court spelled out two bases for its decision. *Ibid.* First, looking to applicable appellate precedent, the court determined that "there is no ability for change of venue in the District of Columbia." *Ibid.* Second, and "[m]ore . . . significantly," the court had

"confiden[ce]" that it could "pick a fair jury." *Ibid.* (first set of brackets in original).

The superior court proceeded to conduct a four-day jury-selection process, during which it "questioned the prospective jurors" individually "regarding what, if anything, they had heard about the South Capitol Street murders, including [the jurors'] exposure to any media coverage of the mass shooting." Pet. App. 17a. Ultimately, of the 12 jurors impaneled, "nine * * * did not recall media coverage of the shooting" at all, while "three * * * were exposed to only minimal coverage such that the court and all of the defendants were confident that it would not have an effect on the jurors' ability to be fair and impartial." *Id.* at 17a-18a (footnotes omitted). None of the defendants "moved to strike these three jurors for cause, sought further questioning, nor raised any objection to their selection." *Id.* at 18a n.12. In addition, "the trial court admonished the jury both during preliminary and final jury instructions to avoid any outside publicity on the shooting and to decide the case based solely on the evidence presented at trial." *Id.* at 18a.

After a nearly-three-month trial, the jury found the defendants guilty on all counts charged. Pet. App. 15a-16a. The superior court sentenced petitioner to concurrent terms of life imprisonment without release on each of the five counts of first-degree murder and to lesser terms on the remaining counts. Judgment 1-10.

3. The District of Columbia Court of Appeals affirmed. Pet. App. 1a-98a.

With respect to pretrial publicity, the court of appeals observed that, pursuant to its longstanding precedent, "[t]he trial court did not err in denying [petitioner]'s motion for a change of venue because that

relief is not available for cases tried before the Superior Court of the District of Columbia." Pet. App. 18a; see *United States* v. *Edwards*, 430 A.2d 1321, 1345 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982). The court then "[f]urther" explained that petitioner's "constitutional right to a fair trial was not violated," finding that "the trial court carefully ensured that [petitioner's] right[] to a fair and impartial jury w[as] protected through the voir dire process." Pet. App. 19a, 21a.

The court of appeals emphasized that the trial court had asked each prospective juror "about his or her knowledge of the South Capitol Street murders," allowed counsel "to further question and strike jurors," and "excused jurors who indicated that they may have been influenced by media coverage." Pet. App. 21a. The court of appeals also observed that, notwithstanding the "high-profile" nature of the case, "nine [of the 12 impaneled jurors] had no recollection of relevant media coverage," and the other "three were exposed to only minimal coverage." *Ibid.* The court of appeals accordingly determined that the trial court's jury-selection measures "'served to protect the right to a fair trial by an impartial jury'"—a determination that was "bolstered" by "defense counsels' failure to object to any of the impaneled jurors, including the ones who had been exposed to some pretrial publicity" or to present "any evidence that the jury was actually partial." *Id.* at 22a (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 7-17) that the trial court's denial of his motion for a change of venue violated his Sixth Amendment right to an impartial jury. The court of appeals, after determining through careful review of the record that petitioner was found

guilty of five counts of first-degree murder and 45 other crimes by an impartial jury, correctly found no Sixth Amendment violation in this case. See Pet. App. 18a-22a. The court's case-specific holding does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

1. The Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." That right "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961); see, *e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 378 (2010). Of particular relevance here, "juror *impartiality* * * * does not require *ignorance*." *Skilling*, 561 U.S. at 381; see *id.* at 398 ("Jurors * * * need not enter the box with empty heads in order to determine the facts impartially."). Thus, even in cases involving extensive pretrial publicity, a fair trial is possible if "jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court." *Id.* at 398-399 (brackets and citation omitted).

As the court of appeals here correctly determined after careful analysis of the record, petitioner's "rights to a fair and impartial jury were protected through the voir dire process." Pet. App. 21a. "Jury selection took place over the course of four days and each prospective juror was individually asked by the [trial] court about his or her knowledge of the South Capitol Street murders." *Ibid.* Both the "government and defense counsel * * * were given the opportunity to further question and strike jurors," and the "trial court also excused jurors who indicated that they may have been influenced

by media coverage." *Ibid.* Those procedures produced a jury in which nine members "had no recollection of relevant media coverage," and the other "three were exposed to only minimal coverage" and "expressly stated that it would not influence their decision." *Ibid.* The trial court, moreover, repeatedly "admonished the jury * * * to avoid any outside publicity on the shooting and to decide the case based solely on the evidence presented at trial." *Id.* at 18a. The court of appeals correctly found that those measures, particularly when considered with proper "defer[ence] to the trial court's assessment of" juror credibility, satisfied the constitutional requirements for producing an impartial jury. *Id.* at 21a-22a; see, *e.g.*, *Skilling*, 561 U.S. at 386-387 (discussing the need for appellate deference to a trial court's jury-selection judgments); *Mu'Min* v. *Virginia*, 500 U.S. 415, 424-427 (1991) (similar).

Petitioner does not meaningfully contest the court of appeals' assessment that no biased juror was impaneled in his case. Instead, petitioner suggests (Pet. 14-15) that if the case were remanded, he would present evidence of such extreme community prejudice that no impartial jury could be selected. But the actual impaneling of an impartial jury in his case would preclude any such showing. Indeed, although petitioner had "the opportunity to * * * question and strike" prospective jurors based on potential bias arising from pretrial-media exposure, Pet. App. 21a, he did not move to strike any of the three jurors who reported exposure to pretrial publicity, seek further questioning on the issue, or otherwise "raise any objection to their selection," *id.* at 18a n.12. Nor did he "present[] any evidence [on appeal] that the jury was actually partial." *Id.* at 22a. As the court correctly reasoned, petitioner's own "failure to

object to any of the impaneled jurors" before or after their selection "bolstered" the finding that the jury was impartial. *Ibid.*; see, *e.g.*, *Skilling*, 561 U.S. at 396 (reasoning that a criminal defendant's failure to challenge most jurors was "strong evidence that he was convinced the[y] were not biased and had not formed any opinions as to his guilt") (citation omitted). That, in turn, proves that it was indeed possible to select an impartial jury.

Petitioner briefly suggests (Pet. 10) that his case is comparable to *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), which found that a "presumption of prejudice" had arisen when a defendant's videotaped confession to a murder was televised multiple times in the "small Louisiana town" where he was tried for that murder, *Skilling*, 561 U.S. at 379 (describing *Rideau*). But petitioner's case is far afield from *Rideau*. Petitioner committed his crimes not in a small town but in the Nation's capital. See *Mu'Min*, 500 U.S. at 429 (describing a crime in "the metropolitan Washington statistical area, which has a population of [several] million, and in which, unfortunately, hundreds of murders are committed each year" and generate headlines). While the level of "initial pretrial publicity surrounding the South Capitol Street murders was high, which is not surprising given the number of casualties involved," petitioner does not suggest that it contained anything resembling the confession in *Rideau*. Pet. App. 21a. And the trial occurred nearly two years later, with measures that produced a jury nine members of which "had no recollection of relevant media coverage" and three members of which had been exposed to only minimal, nonprejudicial coverage. *Ibid.*; cf. *Skilling*, 561 U.S. at 382.

2. Petitioner does not meaningfully press any claim of error in the finding that his jury was impartial, nor

would such a fact-bound claim warrant this Court's review. See Sup. Ct. R. 10. Instead, petitioner claims that his Sixth Amendment right to an impartial jury was violated because he was tried in an irrevocably prejudiced venue. Specifically, he contends (Pet. 7-14) that his convictions must be set aside because the lower courts' denial of his request for a venue change transgressed this Court's decision in *Groppi* v. *Wisconsin*, 400 U.S. 505 (1971). That claim lacks merit.

In *Groppi*, this Court considered a challenge to a Wisconsin statute that the State's highest court had interpreted to categorically prohibit changes of venue for misdemeanor trials. 400 U.S. at 506-507. The defendant there had "asked the [trial] court to take judicial notice of 'the massive coverage by all news media in this community of the activities of this defendant,' or, in the alternative, that 'the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and on the right of defendant to an impartial jury trial.'" *Id.* at 506. The trial court denied the motion and declined to entertain a claim of community prejudice on the sole basis that "Wisconsin law did not permit a change of venue in misdemeanor cases." *Ibid.* While acknowledging that "[t]here are many ways to try to assure * * * [an] impartial jury," including "continuances" and "challenges to the venire," the Court concluded that the Wisconsin statute's disallowance of any opportunity to show the kind of prejudice that would justify a venue change was inconsistent with a defendant's right to a fair trial. *Id.* at 509-510; see *id.* at 511 ("[U]nder the Constitution a defendant must be given an opportunity to show that a change of venue is required in his case. The Wisconsin statute wholly denied that opportunity.") (emphases omitted).

Critically, however, the *Groppi* Court did not order a new trial as a remedy. Instead, the Court left the question "[w]hether corrective relief can be afforded the [defendant] * * * short of a new trial" to "the Wisconsin courts to determine in the first instance." 400 U.S. at 512 n.13. The Court pointed out that the trial court's denial of the venue-change motion "in its entirety" had "foreclos[ed] any opportunity to produce evidence of a prejudiced community." *Id.* at 508 n.5. And Justice Blackmun observed in his concurring opinion that the Court's decision provided only that—an "opportunity to demonstrate prejudice and the likelihood of an unfair trial." *Id.* at 514; see *ibid.* (cautioning that, although "final footnote" in the Court's opinion "may be lost to the reader," the Court's holding "does not *necessarily* mean a new trial"). The existing record, which among other things contained "no transcript * * * of the *voir dire* proceedings," *id.* at 506 n.2 (majority opinion), provided "no way" for a reviewing court to "evaluate from the *voir dire* the presence, or the possibility of the presence, of actual prejudice in * * * the jury panel," *id.* at 513 (Blackmun, J., concurring), and a remand would permit such an assessment. *Groppi* thus stands for the proposition that a defendant is entitled to an opportunity to demonstrate prejudice on the part of the impaneled jurors that deprived him of a fair trial by an impartial jury; it does not mean that a criminal defendant has a standalone constitutional right to seek a change of venue if he has received such a trial.

Reading *Groppi* to allow for new-venue claims even where a defendant actually had an impartial jury would place it significantly out of step with subsequent Sixth Amendment decisions. For example, in the closely related context of challenges to the venire—which *Groppi*

identified, alongside change of venue, as one means of ensuring a fair trial, 400 U.S. at 509-510—this Court has held that such "challenges are not of constitutional dimension," but instead "are a means to achieve the end of an impartial jury," *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988); see *ibid.* ("So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."). Indeed, even a trial court's erroneous denial of a procedural remedy to which the defendant was entitled—such as the for-cause removal of a biased juror—does not violate that defendant's right to a fair trial by an impartial jury so long as "the impartiality of the jury eventually seated was not challenged." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 309 (2000); see *id.* at 315-316. In short, "if the defendant * * * is * * * convicted by a jury on which no biased juror sat, he has not been deprived of any * * * constitutional right." *Id.* at 307.

Petitioner contends that denying a change of venue in a case in which the "jury pool is thoroughly and completely tainted by prejudice against" a defendant would violate "'minimal standards of due process.'" Pet. 14 (citation omitted). But that is not the case here, where the jury pool produced an unbiased jury. As *Groppi* recognized, "[t]here are many ways to try to assure the kind of impartial jury that the [Constitution] guarantees," one of which is "a method of jury qualification that will promote, through the exercise of challenges to the venire—peremptory and for cause—the exclusion of prospective jurors infected with the prejudice of the community from which they come." 400 U.S. at 509-510. That protection is not always adequate, see *id.* at 510, but it was adequate here, because the impaneling of an

impartial jury both proves that it was possible and granted petitioner the very protection to which he was entitled. Because petitioner's "constitutional right to a fair trial was not violated," Pet. App. 19a, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
JOSHUA K. HANDELL
Attorney

DECEMBER 2021