No. 08-987

In the Supreme Court of the United States

RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO, GERARDO HERNANDEZ, AND LUIS MEDINA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eleventh Circuit failed to account for the historical importance of the right to change venue to avoid pervasive community prejudice.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 10,000 attorney members and 28,000 affiliate members in all fifty states. The NACDL is an affiliate of the American Bar Association and has full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, advance knowledge of the law among criminal law practitioners, and encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL's objectives include ensuring due process for persons accused of crime, promoting the proper and fair administration of criminal justice, and preserving the protections guaranteed to defendants by the United States Constitution.

The NACDL urges the Court to grant the petition and review the venue transfer ruling below, which we believe undermines a fundamental right of criminal defendants.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

SUMMARY OF ARGUMENT

The right of a criminal defendant to transfer venue to avoid severe community prejudice reflects values originating in early English and colonial practice that the Framers enshrined in our Constitution after deliberative debate. That right is embodied in two constitutional provisions.

Article III, Section 2, Clause 3 of the Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Constitution's Sixth Amendment provides in relevant part:

> In 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, which district shall have been previously ascertained by law.

The Article III provision addresses the location of trial and thus is a venue provision, while the Sixth Amendment provision addresses the place from which jurors are selected and thus is a vicinage provision. These provisions reflect the long established common law rule that a defendant has a right to be tried where the alleged crime occurred rather than be transported to a distant locale and forced to forfeit the procedural advantages of being adjudged in one's home court. The vicinage right was, therefore, a right

historically held by the defendant to protect against malicious or unfair prosecution. It was not intended to alter the long-established common law rule that allowed the defendant to waive that right when widespread community prejudice impeded his ability to a fair trial by an impartial jury, a right also incorporated in the Sixth Amendment. The restrictive approach of the courts below to this issue runs counter to the historical foundation of these provisions. As a result, petitioners were convicted by a jury of the vicinage at the expense of their right to trial by an impartial jury.

ARGUMENT

As this Court explained in *Groppi* v. *Wisconsin*, 400 U.S. 505, 511 (1971), its authorization of venue changes to avoid pervasive community prejudice "echoes more than 200 years of human experience in the endless quest for the fair administration of justice." However, the Court's decisions on this issue lack a detailed discussion of the historical background to the Sixth Amendment's vicinage provision. This brief offers a brief summary of that history, which amicus believes supports the need for this Court to review whether the Eleventh Circuit's treatment of the transfer of venue issue departed from the historical meaning of the Sixth Amendment.

A. The Right To Transfer Venue To Avoid Community Prejudice Is Rooted In Early English Practice

Juries were not always the impartial administers of justice that we know today. The original Anglo-Saxon criminal jury consisted of individuals selected precisely because they were familiar with the alleged crime or knew the accused person. FRANCIS H.

HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 8 (1951). If the jurors were unfamiliar with the alleged criminal activity, they were expected to do their own investigation prior to trial and then testify at trial as to what they had learned. *Ibid*. Accordingly, it was imperative that juries be drawn from the community where the alleged crime occurred. This requirement was so strict that, if a crime was committed partly in one county and partly in another, the defendant could not be tried. William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 61 (1944) (citing 3 COKE, INSTITUTES 48 (1797)); *People* v. *Powell*, 87 Cal. 348, 358 (1891) (citing Hawk. P.C., b. 2, c. 25; 1 CHITTY'S CRIMINAL LAW 177).

By the eighteenth century, the jury had gradually developed into "a body of impartial men who come into court with an open mind[,] instead of finding the verdict out of their own knowledge." Blume, *supra*, 43 Mich. L. Rev. at 60 n.8. As Lord Mansfield put it in 1764: "A juror should be as white Paper, and know neither Plaintiff nor Defendant, but judge the Issue merely as an abstract Proposition, upon the evidence produced before him." *Id*. at 60-61 (citing *Mylock* v. *Saladine*, 1 Wm. Blackstone Rep. 480, 481 (1781)).

Jurors nevertheless continued to be summoned from the locality where the crime was committed because of the obvious procedural advantages associated with having the trial near the scene of the crime and the defendant's likely residence. William Henry Jernigan, Jr., Note, *The Sixth Amendment and the Right to a Trial by a Jury of the Vicinage*, 31 Wash. & Lee L. Rev. 399, 404 (1974). According to Black-

stone, the sheriff was required to "return a panel of jurors, *liberos et legales homines, de vicineto*, that is, free holders, without just exception, and of the *visne* or neighborhood; which is interpreted to be of the county where the fact is committed." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *344.[2]

But English courts began to depart from the strict vicinage rule as they came to recognize that a local jury in communities infected by prejudice could impede a fair trial. See *Zicarelli* v. *Gray*, 543 F.2d 466, 475 (3d Cir. 1976) (discussing the history of impartial juries). To ensure a fair trial, they therefore developed a common law rule allowing them to change venue upon a showing of extreme prejudice in the community. See *State* v. *Albee*, 61 N.H. 423, 425 (1881) ("As the right of trial by a jury *de vicineto*, or of the *visne* or neighborhood, was given for the protection of the subject, so the power was early given to the court of king's bench for the protection also of the subject to remove the venue upon a suggestion duly supported that a fair and impartial trial cannot be had").

This new and developing rule was applied in numerous cases. For example, in ordering a change of venue, the court in *The Queen* v. *County of Wilts*, 87 Eng. Rep. 1046, 1047 (1705), explained that "this matter concerning the whole county, suggestion may

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[2] Early discussions of the vicinage right often assumed that the locality where the crime occurred would be the same locality where the defendant resided, an assumption that made sense "in an age of restricted travel and mobility." Comment, *Multi-Venue and the Obscenity Statutes*, 115 U. Pa. L. Rev. 399, 413 (1967).

be of any other county's being next adjacent, and the venue shall come from thence for the necessity of an indifferent trial." *Ibid.* Again, in *Rex* v. *Cowle*, 97 Eng. Rep. 587, 603 (1759), the court ordered a change of venue in an assault case, stating the rule that "whether a fair, impartial, or satisfactory trial or judgment can be had there, is a reason to remove from the highest." The court noted that the case was "a great contention in the borough" and that the "matter laid in the indictment arose from a warm dispute at the guild, upon a point of business, which produced a riot and tumult, that broke up the guild in great confusion." *Ibid.* Similarly, in *The King* v. *County of Cumberland*, 101 Eng. Rep. 507, 507 (1795), Lord Kenyon stated that it would be an "anomalous case in the law of England" were the court not to have the power to order a change of venue where the "inhabitants of the county are interested" in the verdict. And in *Poole* v. *Bennet*, 93 Eng. Rep. 909, 909 (1795), the court ordered a change of venue on motion where it appeared "there could be no fair trial" in the county where the matter arose.

Changing venue to ensure a fair trial remained an established feature of English criminal law practice. See *The King* v. *Thomas*, 105 Eng. Rep. 897 (1815); *The Queen* v. *Palmer*, 119 Eng. Rep. 762 (1856). As nineteenth-century treatises recognized, "[a]t common law, when a fair and impartial trial cannot be obtained, and the indictment has been removed into the king's bench by certiorari, the court have a power of directing the trial to take place in the next adjoining county when justice requires it." *Albee*, 61 N.H. at 425 (quoting 1 CHITTY'S CRIMINAL LAW 201).

Trial by a jury of the vicinage increasingly came to be seen during the eighteenth century as a right belonging to the defendant. As explained by the Chief Justice of the North Carolina Supreme Court, it facilitated the defendant's collection of evidence, gathering of witnesses, and empanelment of a sympathetic jury of neighbors. Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. Pa. L. Rev. 197, 205 (1909). This understanding is manifest in parliamentary records from 1768 and 1769 debating the revival of 35 Henry VIII, c. 2 (1543), which permitted trial for treason committed in the American colonies to occur in England at a location chosen by the King. Blume, *supra*, 43 Mich. L. Rev. at 63-65. Parliamentary opponents of the measure argued vigorously that the law would deprive colonists of their basic right to a jury of their peers:

> They commented forcibly on the cruelty and injustice of dragging an individual three thousand miles from his family, his friends, and his business, "from assistance, countenance, comfort and counsel necessary to support a man under such trying circumstances," in order that, with the Atlantic between him and his own witnesses, he might be put to peril of his life before a panel of twelve Englishmen, in no true sense of the word his peers. Of those jurymen the accused colonist would not possess the personal knowledge which alone would enable him to avail himself of his right to challenge; while they on their side would infallibly regard themselves as brought together to vindicate the law against a criminal of whose guilt the responsible authorities were fully assured.

Connor, *supra*, 57 U. Pa. L. Rev. at 206. Thus, by the mid-eighteenth century in England, a jury of the vicinage was viewed as a right of the defendant that he could waive if it would impede his right to a fair and impartial jury.

B. The Right To Transfer Venue To Avoid Community Prejudice Is Rooted In American Colonial Practice

The colonists "at all times, insisted that they brought with them across the seas, either as their inalienable birthright, or, as guaranteed by the charters, trial by jury, as it existed in England." Connor, *supra*, 57 U. Pa. L. Rev. at 197. However, as tensions grew between Great Britain and its American colonies, many colonists believed that right to be increasingly jeopardized.

As noted above, beginning in December 1768 Parliament debated and approved the revival of a statute that would allow persons accused of committing treason in the American colonies to be transported to England for trial. Blume, *supra*, 43 Mich. L. Rev. at 63-64. This measure was met with fervent resistance in the American colonies. On May 17, 1769, Virginia delegates adopted an address to the King stating:

> When we consider, that by the established Laws and Constitution of this Colony, the most ample Provision is made for apprehending and punishing all those who shall dare to engage in any treasonable Practices against your Majesty, or disturb the Tranquility of Government, we cannot, without Horror, think of the new, unusual, and permit us, with all Humility, to add, unconstitutional

> and illegal Mode, recommended to your Majesty, of seizing and carrying beyond Sea, the Inhabitants of America, suspected of any Crime; and of trying such Persons in any other Manner than by the ancient and long established Course of Proceeding: For, how truly deplorable must be the Case of a wretched American, who, having incurred the Displeasure of any one in Power, is dragged from his native Home, and his dearest domestick Connections, thrown into Prison, not to await his Trial before a Court, Jury, or Judges, from a Knowledge of whom he is encouraged to hope for speedy Justice; but to exchange his Imprisonment in his own Country, for Fetters amongst Strangers? *Conveyed to a distant Land, where no Friend, no Relation, will alleviate his Distresses, or minister to his Necessities; and where no Witness can be found to testify his Innocence*; shunned by the reputable and honest, and consigned to the Society and Converse of the wretched and the abandoned; he can only pray that he may soon end his Misery with his life.

Id. at 64-65 (citing JOURNALS OF THE HOUSE OF BURGESSES 1766-1769, at 215-216 (Kennedy, ed.,1906)) (emphasis added). It is hence not surprising that this offense was among those listed in the Declaration of Independence, which complained of "transporting us beyond Seas to be tried for pretended offenses" and "depriving us in many cases, of the benefits of Trial by Jury."

When the Constitution was subsequently submitted to the States for ratification, the lack of a nar-

rowly drawn vicinage provision was a major source of opposition, with many arguing forcefully that the Article III venue provision was too vague to protect defendants' rights. HELLER, *supra*, at 25; see also Connor, *supra*, 57 U. Pa. L. Rev. at 200. State legislators argued vigorously that the common law right to a jury of the vicinage must be more clearly secured for the benefit of defendants. A complaint lodged by Patrick Henry was typical:

> This great privilege [is] prostrated by this paper. Juries from the vicinage being not secured, this right is in reality sacrificed. All is gone. * * * Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. * * * Has not your mother country magnanimously preserved this noble privilege upwards of a thousand years? * * * And shall Americans give up that which nothing could induce the English people to relinquish? The idea is abhorrent to my mind.

HELLER, *supra*, at 25. William Grayson, who became one of Virginia's first two Senators, seconded Henry's opposition, stating:

> [W]here the governing power possesses an unlimited control over the venue, no man's life is in safety. * * * The idea which I call true vicinage is, that a man shall be tried by his neighbors. But the idea here is, that he may be tried in any part of the state. * * * The jury may come from any part of the state [and] they can hang any one they please, by having a jury to suit their purposes.

Id. at 26.

The outcry is well documented in the political literature of the time. For instance, one pamphlet objected to the "loss of the invaluable right of trial by an unbiassed jury, so dear to every friend of liberty." NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS 457 (1997) (reprinting *Address and Reasons of Dissent of the Minority of the Pennsylvania Convention*, Dec. 12, 1787). Another complained of the "loss of the trial in the vicinage, where the fact and the credibility of your witnesses are known, and where you can command their attendance without insupportable expence, or inconveniences." *Id.* at 452 (reprinting *A Son of Liberty*, Nov. 8, 1787).

These substantial protests reflected a deeply felt concern for the rights of criminal defendants. Although the Constitution was ratified over these objections, demand for a Bill of Rights immediately followed.

C. The Ratification Of The Sixth Amendment Recognized That The Vicinage Provision Reflects A Criminal Defendant's Right

Following ratification of the Constitution, James Madison, after extensive "labour and research" in the "grievances and complaints of newspapers—all the articles of Conventions—and the small talk of their debates," drafted the Bill of Rights. COGAN, *supra*, at 479 (reprinting Letter from Fisher Ames to Thomas Dwight, June 11, 1789). His draft included a vicinage provision that stated: "Trial of all crimes * * * shall be by an impartial jury of freeholders of the vicinage." I ANNALS OF CONGRESS OF THE UNITED STATES 1st Cong., 1st Sess., at 452 (1789) (hereinafter I ANNALS).

That draft provision was a major source of debate in the first Congress. Concern persisted that the term "vicinage" was too vague. Aedamus Burke of South Carolina introduced an amendment after the provision was submitted to the House:

> Mr. Burke moved to change the word "vicinage" into "district or county in which the offence has been committed." He said this was conformable to the practice of the State of South Carolina, and he believed to most of the States in the Union; it would have a tendency also to quiet the alarm entertained by the good citizens of many of the States for their personal security; they would no longer fear being dragged from one extremity of the State to the other for trial, at the distance of three or four hundred miles.

I ANNALS at 789. The proposed amendment was denied after another representative asserted that the term vicinage was "well understood by every gentleman of legal knowledge." *Ibid*. Ultimately, the House passed the vicinage provision as it was presented by Madison, apparently with a consensus understanding that the provision incorporated a defendant's right against transport to an unfair venue.

In the Senate, the vicinage provision did not fare as well due to apparent concern that the term "vicinage" was too vague and would afford insufficient protection to defendants. Little is known about the Senate debates surrounding the Sixth Amendment, but when the amendments were returned to the House, the vicinage provision had been deleted. HELLER, *supra*, at 32. A letter from Madison sheds some light on the debate:

> [The Senators] are equally inflexible in opposing a definition of the locality of Juries. The vicinage they contend is either too vague or too strict a term: too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the County. It was proposed to insert after the word juries—"with the accustomed requisites"—leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained. * * * The Senate suppose also that the provision for vicinage in the Judiciary bill, will sufficiently quiet the fears which called for an amendment on this point.

COGAN, *supra*, at 480-481 (reprinting Letter from James Madison to Edmund Pendleton, Sept. 23, 1789).

The House, however, refused to agree to the Senate's deletion. After a number of compromises, the vicinage provision was included in the Sixth Amendment, with its draft language changed to "State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," thereby allowing Congress to determine the boundaries of the districts. HELLER, *supra*, at 33-34. Although not conclusive, this ratification debate indicates that that the adopters of the Sixth Amendment understood the vicinage provision, like the other provisions in that amendment, to be an important procedural protection for criminal defendants.

D. The Right To Transfer Venue To Avoid Community Prejudice Is Reflected In Early State Practice

Following ratification of the Constitution and adoption of the Bill of Rights, the States adopted their own constitutional provisions. These varied from State to State, but their content was generally consistent with the Federal Constitution's Sixth Amendment. Blume, *supra*, 43 Mich. L. Rev. at 67. The States also continued to follow the common law rule allowing change of venue in cases where a fair trial was jeopardized due to strong community prejudice.

Indeed, a number of states considered the right to change venue to obtain a fair trial to be so fundamental that they enshrined the common law doctrine into their state laws. For example, Arkansas enacted a statute granting defendants the right to change venue where "the minds of the inhabitants of the county in which the cause is pending, are so prejudiced against the defendant that a fair and impartial trial cannot be had therein." *Osborn* v. *State*, 24 Ark. 629, 632 (1867). See also *Kirk* v. *State*, 41 Tenn. 344, 350 (1860) (referring to an Act of 1827 that allowed defendants to change venue in criminal cases); *Dula* v. *State*, 16 Tenn. 511, 513 (1835) ("it would be a serious injury inflicted, in forcing a man to commit his life into the hands of a prejudiced jury" and noting that laws allowing for change of venue in criminal cases had "existed ever since the year 1808"); *Crocker* v. *Superior Court*, 208 Mass. 162, 174 (1911) ("Since the adoption of the Constitution, several statutes have been passed enlarging the venue of actions, in order to secure trials before indifferent jurors").

Courts also continued to assert their common law power to allow a defendant to change venue due to prejudice. As the New Hampshire Supreme Court explained, the practice of English courts to change the venue "became thoroughly engrafted upon the common law long before the independence of this country; and from that time forth not only has the practice prevailed in the courts of England, but the power is now exercised by the courts of very many if not all of our States, either by force of express statute or the adoption of the common law into the jurisprudence of the same." *Cochecho R.R.* v. *Farrington*, 26 N.H. 428, 436 (1853); see also *Crocker*, 208 Mass. at 175 ("it is an inherent power of common law courts to order a change [of venue] for the purpose of securing an impartial trial"). And state courts consistently articulated the right to a jury of the vicinage as a defendant's right that could be waived to obtain an impartial jury.[3]

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[3] See, *e.g.*, *State* v. *Cutshall*, 110 N.C. 538, 543-544 (1892) (a defendant is entitled to a jury of his peers unless it is "necessary to remove the case to some neighboring county in order to secure a fair trial"); *People* v. *Powell*, 87 Cal. 348, 360-361 (1891) (venue cannot be changed without defendant's consent who "has only to show that a fair and impartial trial cannot be had in the county"); *Perteet* v. *Illinois*, 70 Ill. 171, 173 (1873) (trial court erred by refusing defendant's requested change of venue); *Wheeler* v. *State*, 24 Wis. 52, 52-53 (1869) (trial court erroneously ordered change of venue over defendant's objection; right exists to prevent defendant "from being taken out of the district for trial"); *State* v. *Denton*, 46 Tenn. 539, 541 (1869) (the "right of the accused to be tried in the county in which the offense is alleged to have been committed, is a right secured to him by the Constitution, and of which he cannot, in any case, be deprived without his consent given in open court"); *Osborn* v. *State*, 24 Ark. 629, 633 (1867) (change

In 1881, the New Hampshire Supreme Court, in a case cited by this court in *Groppi*, 400 U.S. at 511 n.12, articulated the nature and importance of the right to transfer venue in the face of community prejudice. *Albee*, 61 N.H. at 425. After a thorough review of the history of this principle, the court concluded:

> It is the respondent's privilege to be tried in the county where the offence was committed. This provision in our bill of rights, designed for the protection of the accused, was regarded by the framers of the constitution as a privilege of the highest importance, because it would prevent the possibility of sending him for trial to a remote county, at a distance from friends, among strangers, and perhaps among parties animated by prejudices of a personal or partisan character. *But they did not intend to destroy his common-law right to a change of venue whenever a fair and impartial trial could not be had in the county where the fact happened*. The purpose of this constitutional provision was the protection, not the destruction, of individual rights. The constitutional provision is an affirmance of the prisoner's common-law right not to be tried at a distance from the county in which his of-

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of venue could not be ordered without defendant's consent); *Kirk* v. *State*, 41 Tenn. at 350 (defendant "may waive" a jury of the vicinage); *Cochrane* v. *State*, 6 Md. 400, 404 (1854) (noting that venue was changed at defendant's request); *Dula* v. *State*, 16 Tenn. 511, 512-513 (1835) (a defendant's right to a trial by a jury of the vicinage does not "prevent him from choosing another county [to] effectuate the great end, for which the one beforementioned was by the constitution secured").

> fence is charged; and this common-law and constitutional right he may waive for the purpose of securing the fair trial which the constitution guarantees. A change of venue under such circumstances is calculated to preserve the system of jury trial in its purity, and thereby to increase the confidence of the community in its safety and usefulness.

Id. at 429 (citation omitted) (emphasis added).

Similarly, in *Crocker*, 208 Mass. at 178-179, which also was cited by this Court in *Groppi*, 400 U.S. at 511 n.12, the Massachusetts Supreme Court exhaustively reviewed the common law practice of changing venue to ensure a fair trial, concluding:

> It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action.

This right of a criminal defendant to change venue to avoid pervasive prejudice and obtain a fair trial was later enshrined in this Court's decisions in *Rideau v. Louisiana*, 373 U.S. 723 (1963), and *Groppi*, 400 U.S. 505. The Eleventh Circuit's decision in this case represents a giant step backwards from this enlightened jurisprudence.

* * *

In sum, the principle that the vicinage right belongs to the defendant—to protect his right to a fair

trial—is rooted in the origins of the jury, in English practice, in the establishment of our Constitution and its Bill of Rights, and in post-enactment statutes and common law. The courts below gave insufficient weight and consideration to this fundamental right by failing to recognize that otherwise appropriate courtroom procedures (such as comprehensive *voire dire*) can amount to but "a hollow formality" in the face of pervasive community prejudice. *Rideau*, 373 U.S. at 726. Amicus urges this Court to grant the petition, reverse the judgment of the Eleventh Circuit, and uphold the right to a fair and impartial trial free from the taint of community prejudice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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