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VIRLYNN TINHELL
SUPERIOR COURT CLERK

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MOHAVE**

10 **STATE OF ARIZONA,**

11 Plaintiff,

12 vs.

13 **JUSTIN JAMES RECTOR**

14 Defendant.

11) NO: CR 2014 - 01193

12) **DEFENDANT'S MOTION FOR CHANGE**
13) **OF VENUE**

14) (ASSIGNED TO THE HON. LEE JANTZEN)

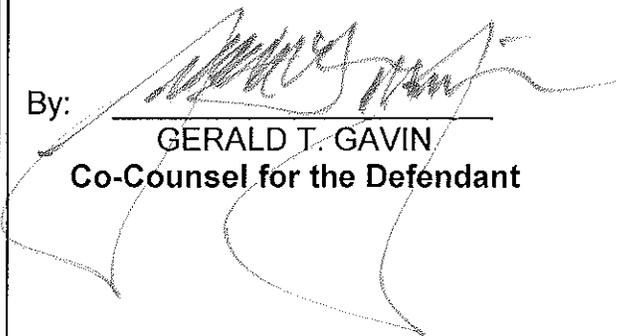
15 _____
16)
17)
18)
19 Defendant Justin James Rector, by and through undersigned counsel, pursuant
20 to the Arizona Rule of Criminal Procedure 10.3, the Fifth, Sixth, Eighth, and Fourteenth
21 Amendment to the United States Constitution, and Article II, §§ 4, 10, 15, and 24 of the
22 Arizona Constitution, hereby moves this Court for change of venue , as explained in
23 the Memorandum of Points and Authorities attached hereto and incorporated herein.
24
25
26

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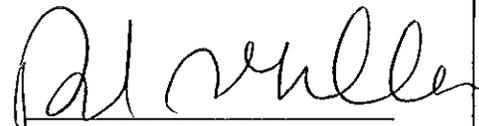


SS015CR201401193

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2
3 **RESPECTFULLY SUBMITTED** this 20th day of August, 2015.

4
5 By: 

6 GERALD T. GAVIN
7 **Co-Counsel for the Defendant**

8
9 By: 

10 RON GILLO
11 **Co-Counsel for Defendant**

12
13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14
15 Mr. Rector believes the media attention to has, and will continue, to saturate this
16 relatively tiny locale regarding his case, making the task of obtaining a jury not tainted
17 by coverage of the alleged details of the crime, and detailed accounts of the pretrial
18 legal activities, nearly impossible. While local television coverage has been sporadic,
19 and originated in the Phoenix and Las Vegas television markets, local newspaper
20 coverage has provided in-depth coverage of the case itself, and the pretrial legal
21 maneuvering inherent in criminal cases. The issues being discussed on the record, and
22 through motion practice, are issues intended to be resolved before a jury is seated.
23 They are issues both the defense and the State want resolved before the trial court,
24 without the participation of potential jury pool.

25
26 The right to trial by jury is a sacred right in American Jurisprudence. In an
27 American criminal trial, evidence is meted out to a selected jury in a strictly controlled
28 environment. Many issues regarding the Rules of Evidence are litigated before a jury is
exposed to potentially inaccurate, prejudicial, misleading, or irrelevant "facts" which
may not be facts, or may be incomplete facts, or may be inappropriate facts regarding
the issues at bar. Mr. Rector understands the members of the media are attempting to

1 "do their job", and report "the news". Since Mr. Rector's very life is at stake, he is
2 concerned that the limited number of news outlets in our rural county, the gravity of the
3 alleged crime, and the salacious nature such crimes imbue, coverage of the litigation of
4 legal issues that may never properly be lodged in front of a jury may prejudice the very
5 limited jury pool of this county, making it impossible to seat an impartial jury in this
6 county.

7 In Irwin v. Dowd, 366 U.S. 717, 725-28 (1961), the Supreme Court of the United
8 States held that the defendant's right to an impartial jury was denied by a presumption
9 of prejudice arising from extensive pretrial publicity. The Court found a presumption of
10 prejudice arising from extensive pretrial publicity. The Court found a presumption of
11 prejudice despite the sincerity of the jurors who stated that they could be "fair and
12 impartial" to the defendant. Id. at 725-6. In Irvin, the viewpoint of the community was
13 revealed by the media's pretrial coverage. Id. at 725. The media portrayed Mr. Irvin as
14 a person of especially bad character, due to his prior criminal record and status as a
15 parole violator. Id. Further accounts noted that Irvin confessed and offered to plead
16 guilty to avoid the death penalty. Id. at 726. See Also Sheppard v. Maxwell, 384
17 U.S. 333, 352-53. (1966) (presumed prejudice from pretrial publicity on totality of the
18 circumstances); Rideau v. Louisiana, 373 U.S. 723, 725-27 (1963) (defendant denied
19 due process without change of venue after confession was televised. This is directly
20 analogous to the release of a jail call purportedly from Mr. Rector regarding his
21 "confession" to the crime at hand.
22

23
24 The premium on impartiality is nowhere greater than in a capital case
25 where a jury must choose between life imprisonment and death of they find the accused
26 guilty of capital murder. See Morgan v. Illinois, 504 U.S. 719, 726-728 (1992) (jurors
27 must be impartial with respect to culpability and punishment in a death penalty case.) A
28 biased juror is unable to apply the facts to the law and deliberate under the

1 constitutionally required burden of proof. See In re Winslip, 397 U.S. 358 (1970). The
2 trial judge has a “duty to protect [the accused] from [this type] of inherently prejudicial
3 publicity...” that renders the jury unfair in its deliberations. Sheppard, 384 U.S. at 363.
4 Whether it is or not the right to a fair and impartial jury is fundamental. The denial of
5 that right is structural error that is never harmless. See Arizona v. Fulimante, 499 U.S.
6 279, 290 (1991).

7 “A motion for a change of venue... **shall** be granted whenever it is
8 determined that because of the dissemination of potentially prejudicial material, there is
9 a **reasonable likelihood** that in the absence of such relief, a fair trial cannot be had.”
10 *ABA Standards Relating to Fair Trial and Free Press*, §3.2 (1968) (emphasis add).
11 The United States Supreme Court has insisted that an accused be tried by “a public
12 tribunal free of prejudice, passion, excitement, and tyrannical power.” Chambers v.
13 Florida, 309 U.S. 227, 236-237 (1940). The Court has likewise recognized that failure
14 to ensure the impartiality of the jury “violates even the minimum standards of due
15 process.” Irwin at 722.

17 Because this is a capital case, changing venue is the only way to vindicate
18 Defendant’s Federal and State Constitutional rights to effective assistance of counsel,
19 due process of law, equal protection of the law, confrontation of the State’s evidence
20 against him, and freedom from cruel and unusual punishment. U.S. Constitutional
21 Amendments V, VI, VIII, and XIV; Arizona Constitutional Article II, §§ 4, 10, 15, and 24.

22 In the Sheppard case, the Court ruled that the Constitution requires that, in a
23 criminal case, “the jury’s verdict be based on evidence received in open court, not from
24 outside sources.” Although potential jurors will likely be queried extensively about their
25 exposure to Mr. Rector’s case, the Court in Sheppard noted, “we (do) not consider
26 dispositive the statements of (jurors) that (they) would not be influenced by news
27
28

1 articles, that (they) could decide the case only on the evidence of record, and that (they)
2 felt no prejudice against (the defendant) as a result of articles (in the media). Sheppard,
3 384 U.S. at 351 (quoting Marshall v. United States, 360 U.S. 310, 312 (1959)). As the
4 Court in Sheppard held, "(g)iven the pervasiveness of modern communication and the
5 difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must
6 take strong measures to ensure that the balance is never weighed against the
7 accused." Sheppard, 384 U.S. at 362. Sheppard, like this case, was a capital case.
8 The Court made very clear "(w)ith his life at stake, it is not requiring too much that (the
9 defendant) be tried in an atmosphere undisturbed by (prejudicial pretrial publicity)..."
10 Sheppard, at 384 U.S. at 351 (quoting Irvin, 366 U.S. at 728).

11 This issue was addressed by the Supreme Court of Florida, who addressed this
12 issue in another capital case:

13 We take care to make clear, however, that every trial court in
14 Considering a motion for change of venue must liberally resolve
15 in favor of the defendant any doubt as the ability of the State to
16 furnish a defendant a trial by a fair and impartial jury. Every
17 reasonable precaution should be taken to preserve to a defendant
18 trial by such a jury and to this end if there is reasonable basis
19 shown for a change of venue a motion therefore properly made
20 should be granted.

19 A change of venue may sometimes inconvenience the State, yet we
20 can see no way in which it can cause any real damage to it. On the
21 other hand, granting a change of venue in a questionable case is
22 certain to eliminate a possible error and to eliminate a costly retrial
23 if it be determined that the venue be changed. More important is the
24 fact that the real impairment of the right of a defendant to trial by a
25 jury to grant change of venue.

23 Singer v. State, 109 So. 2d 7, 14 (Fla. 1959) (reversing a defendant's conviction and
24 death sentence because of the trial court's failure to grant a change of venue).

26 *The Determination of Trial Venue Must Consider the State's Election to Pursue Death*

27 The United States Supreme Court has consistently recognized that, in capital
28 cases, both the guilt and penalty determinations must be structured to assure

1 heightened reliability, not to permit findings whose reliability is diminished. Ford v.
2 Wainwright, 477 U.S. 399, 411 (1986); Caldwell v. Mississippi, 472 U.S. 320, 343
3 (1985) (O'Connor, J. concurring); Beck v. Alabama, 447 U.S. 625, 638 (1980); Lockett
4 v. Ohio, 438 U.S. 586, 605 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977);
5 Woodson v. North Carolina, 428 U.S. 280, 305 (1976). To ensure the requisite degree
6 reliability, the Court has required additional safeguards not present in noncapital cases.
7 Reid v. Covert, 354 U.S. 1, 45-46 (1957) (Frankfurter, J., concurring) ("It is in capital
8 cases especially that the balance of conflicting interests must be weighted most heavily
9 in favor of the procedural safeguards of the Bill of Rights.").

10 Courts around the country have followed in the United States Supreme Court's
11 mandate by recognizing that "a trial court should...be particularly sensitive to the need
12 for a change of venue in capital cases. Johnson v. State, 476 U.S. So. 2d 1195, 1214
13 (Miss. 1985) (reversing conviction and death sentence because of failure to grant (in a
14 noncapital case,¹ it is in death penalty cases that courts have most closely scrutinized
15 the need for a change of venue to affect a capital defendant's constitutionally protected
16 rights to a fair trial and a constitutionally reliable sentencing hearing. See e.g., Jones v.
17 State, 261 Ga. 665, 409 S.E2d 642 (1991); State v. Brown, 496 So.2d 261 (La.1986);
18 and State v. Bey, 96 N.J. 625 (1984)(*overruled by statute on other grounds as stated in*
19 State v. Biegenwald, 106 N.J. 13, 53 n.7 (1987)), 477 A.2d 315 (1984)(all reversing
20
21

22
23 1 Convictions have been reversed in a wide variety of noncapital
24 cases, of course. See e.g. Coates v. State, 773 P.2d 1281
25 (Okla.Cri.1989) (embezzlement); Nickolai v. State, 708 P.2d 1292
26 (Alaska App. 1985) (second degree murder); State v. Paisley, 663
27 P.2d 322 (Mont.1983) (sexual intercourse without consent, felony
28 sexual assault, and misdemeanor sexual assault); People v.
Acomb, 94 A.D.2d 978, 464 N.Y.S2d 103, (4th Dept.
1983) (manslaughter); Com v. Casper, 375 A.2d 737 (Pa.Super
1977) (extortion and menacing); State v. Shawan, 77 N.M. 354, 423
P.2d 39 (1967) (assault with intent to kill); Forsythe v. State,
12 Ohio Misc. 99, 41 Ohio Ops 2d 104, 230 N.E. 2d 681
(1967) (manslaughter); Com v. Mainier, 26 Pa. D&C2d 540 (burlary
and bribery of a police officer); Williams v. State, 162
Tex.Crim. 202, 283 S.W.2d 239 (1955) (rape); and People v. Lucas,
131 Misc. 664, 228 N.Y.S. 31 (1928) (larceny and fraud).

1 convictions and death sentences due to failure to grant change of venue); see also
2 Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985)(granting writ of habeus corpus and
3 vacating conviction and death sentence due to failure to grant change of venue); and
4 Wansley v. Miller, 353 F.Supp 42 (D.C. Va. 1973)(same result).

5 Courts have long understood, and have longstanding precedent, that defendants
6 facing the possibility of a death sentence have a right to be tried by an impartial jury not
7 prejudiced against him, nor prejudging him. See State v. Canada, 48 Iowa 448
8 (1878)(reversing a murder conviction and death sentence because of failure to change
9 venue); and State v. Craften, 89 Iowa 109, 56 N.W. 257 (1893) (same result); see also
10 State v. Meyer, 181 Iowa 440, 164 N.W. 794 (1917).

11 Courts throughout America have not hesitated to consider "that in capital cases
12 the factor of gravity (of potential punishment) must weigh heavily in a determination
13 regarding change of venue." People v. Williams, 48 Cal.3^d 1112, 259 Cal.Rptr. 473, 774
14 P.2d 146, 157 (1989)(quotation omitted)(reversing murder conviction and death
15 sentence because of failure to change venue); see also Com. v. Daugherty, 493 Pa.
16 273, 426 A.2d 104 (1981)(same result); State v. Dryman, 127 Mont. 579, 269 P.2d 796
17 (1954)(same result).

18
19 At least six states, which employ the death penalty as a potential punishment,
20 have explicitly recognized that a different standard must be used in determining where a
21 defendant can get a fair trial when his life is at stake. Jones v. State, supra, 409 S.E.2d
22 at 643; People v. Williams, supra, 774 P.2d at 157; State v. James, 99 Utah Adv. Rpt.
23 14, 767 P.2d 549, 553; Fisher v. State, 481 So.2d 203, 216 (Miss.1985); State v. Bey,
24 supra, 477 A.2d at 317-318; and Forsythe v. State, 12 Ohio Misc. 99, 230 N.E.2d 681,
25 686 (Ohio 1967). The accused's constitutionally protected rights to due process, a fair
26 trial before an impartial jury, *and* the heightened degree of reliability necessary to both
27 the guilt and penalty determination in a capital case require this Court to give explicit
28

1 consideration to the potential punishment the accused stands to receive if convicted in
2 this case when determining the appropriate venue for this cause.

3 The 5th Circuit Court of Appeals articulated a standard in reversing the conviction
4 and death sentence because of the trial court's failure to grant a change of venue.

5 When the life of a man hangs in the balance we should insist
6 that the fullest protection of his right to a trial before a fair and
7 impartial jury should be accorded him. Society is here attempting
8 to take away the life of one of its members. That attempt must
9 be tested by the highest standards of justice and fairness that
10 we know.

11 Juelich v. United States, 214 F.2d 950, 955 (5th Cir. 1954).

12 On August 21st, 2013, the Arizona Supreme Court decided State v. Payne,

13 A defendant is entitled to a change of venue for his trial "if a fair and
14 impartial trial cannot be had. Ariz. Rule of Crim Pro. 10.3(a). To show
15 presumed prejudice, a defendant must show that the publicity "was
16 so extensive or outrageous that it permeated the proceedings or
17 created a carnival-like atmosphere." State v. Blakely, 204 Ariz. 429,
18 434, 65 P.3d 77, 82 (2003) (internal quotations omitted)(quoting State
19 v. Atwood, 171 Ariz. 576, 631, 832 P.2d 593, 648 (1992)). The
20 publicity must be so prejudicial that the jurors could not decide the case
21 fairly. State v. Nordstrom, 200 Ariz. 229, 239, 25 P.3d 717, 727 (2001),
22 *abrogated on other grounds by Ferrer*, 229 Ariz. at 243, 274 Ariz. at 513.
23 We examine whether the publicity was chiefly factual and
24 noninflammatory, and the amount of time between coverage and trial.
25 See State v. Davolt, 207 Ariz. 191, 206, 84 P.3d 456,471 (2004).

26 Payne at page 8.

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22 noninflammatory, and the amount of time between coverage and trial.
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24 Payne at page 8.

1 ORIGINAL of the foregoing filed
this 20th day of August, 2015 with:

2 Clerk of Court
3 401 E Spring Street
Kingman Arizona 86401

4 COPY of the forgoing
5 Delivered this 15th day
6 Of July, 2015, to:

7 Honorable Lee Jantzen
8 Judge of the Superior Court
Mohave County Courthouse
9 2nd floor
Kingman Arizona 86401

10 Greg McPhillips
11 Assigned Deputy County Attorney
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12 Ron Gilleo
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17 Mohave County Jail

18 File

19
20
21 BY: 