ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GORDON HOUSE,	)	
	)	
Petitioner/Appellant,	)	
	)	
v.	)	**Case No. 05-2129**
	)	
ERASMO BRAVO, Warden, Santa Rosa County Correctional Facility, et al.,	)	
	)	
Respondents/Appellees	)	
	)	

On Appeal from
the United States District Court of New Mexico,
Judge Martha Vasquez, presiding
No. 02-0178

PETITIONER'S FIRST BRIEF IN CHIEF IN SUPPORT OF HIS APPLICATION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 USCA § 2254

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STATEMENT OF RELATED OR PRIOR APPEALS

There have been no prior or related federal appeals with regard to the issues presented in this case.

ISSUES PRESENTED

ISSUE 1

Does the Fourteenth Amendment's prohibition on deliberate State action based on racial stereotypes applicable at the petit jury selection stage, ***Batson v. Kentucky***, 476 U.S. 79 (1986), also prohibit deliberate State action to obtain a venue transfer for the purpose of depriving a defendant of any practical possibility that members of his race will be in the venire from which the petit jury is selected?

ISSUE 2

May a state trial judge presume an entire venire bore irrevocable and fixed opinions of both the defendant and the prosecution such that a fair and impartial jury could not be seated without undertaking any *voir dire* or even visiting the venue of the first two trials where the parties had empanelled juries without

incident and conducted two trials resulting in identical hung juries?

ISSUE 3

May a harmless error analysis be applied to a venue transfer arising from intentional state action that was admittedly for the purpose of locating a venue with a predisposition toward guilt, and that reduced the members of defendant's race in the new venue to less than 1% or is moving the defendant's trial to such a venue a "structural error" that is not subject to harmless error analysis under ***Arizona v. Fulminante***, 499 U.S. 279, 309 (1991)?

ISSUE 4

May a state trial judge exercise unfettered discretion to select one of two equal and alternative grounds for conviction where the sole difference between them is that the one selected authorizes a recidivist enhancement, and is New Mexico's 2 year sentence enhancement for DWI-related vehicular homicide, NMSA 1978 §66-8-101(D) irrational under the Fourteenth

Amendment to the U.S. Const., as applied in this case, because by pyramiding the recidivist enhancements New Mexico punishes previously convicted DWI misdemeanants more harshly than previously convicted felons?

ISSUE 5

May a *prima facie* case for judicial disqualification be resolved solely by the judge whose impartiality is challenged, and without any opportunity for a hearing by an impartial factfinder?

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 28 U.S.C. §2254, as Petitioner is a citizen of New Mexico currently incarcerated in a State prison. Petitioner timely exhausted his state appeals on the issues presented to the federal district court.

A certificate of appealability was issued July 22, 2005. This Court's jurisdiction rests on 28 U.S.C. §2253, as the appeal is from a final judgment disposing of all of Petitioner's claims. The decision on review is set forth in the Memorandum Opinion and Order of United States District Judge Martha Vasquez and the adopted portions of Magistrate A. Torgerson's Proposed Disposition. Judge Vasquez' Memorandum was entered on March 31, 2005. The notice of appeal was filed on April 25, 2005.

STATEMENT OF THE FACTS AND CASE[1]

Petitioner, a Navajo man, was charged with a number of offenses in connection with an automobile accident resulting in four deaths which occurred on December 24, 1992, on Interstate 40 in Bernalillo County, New Mexico.[2] Media attention was heavy and referred to by the New Mexico Supreme Court as perhaps "unprecedented in New Mexico."[3] Prior to the first trial, the media reported defense counsel saying, "I can tell you this, if Gordon House was not Native American and if the victims were not Anglos, despite tragedy, [this case] would not have received any where near the kind of

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[1] The citations utilized in this brief are taken from three sources. Those taken from the record proper are designated by "***R.P. at ___***", the ones taken from prior appellate decisions and the U.S. District Court decision in the case are designated by case citation and those taken from a transcript in the case are designated ***TR Vol. __ at __***" ***See State v. House***, 127 N.M. 161, 156-59, 978 P.2d 967, 972-975 (1999) (fact section of opinion); ***State v. House***, 124 N.M. 456, 567-68 953 P.2d 737, 741-42 (Ct.App 1998) (fact section); ***State v. House,*** 130 N.M. 418, 421-22, 25 P.3d 257, 260-61 (Ct.App. 2001) (fact section).

[2] ***State v. House***, 127 N.M. 151, 156-159, 978 P.2d 967, 972-975 (N.M., 1999).

[3] ***Twohig v. Blackmer*** 121 N.M. 746, 747, 918 P.2d 332 (N.M., 1996).

media attention it has generated."[4] The New Mexico Court of Appeals noted, "Allegations of racial bias reached their zenith when District Attorney Robert Schwartz announced his intention to pursue first-degree depraved-mind murder charges against House."[5]

The Preliminary Hearing and Venue Transfer to Taos County

Following a preliminary hearing in Bernalillo County, and dismissal of the depraved mind murder charges, New Mexico State District Judge Frank Allen transferred venue to Taos County, on March 23, 1994 at the defendant's request and with the State's concurrence, because of excessive pre-trial publicity.[6]

The First Trial in Taos County

The case was tried in Taos County and the first jury found Defendant guilty of DWI but deadlocked 9-3 in favor of conviction on the wrongful death felony

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[4] ***Twohig v. Blackmer*** 121 N.M. 746, 748, 918 P.2d 332, 334 (N.M., 1996).

[5] ***Twohig v. Blackmer*** 121 N.M. 746, 748, 918 P.2d 332, 334 (N.M., 1996).

[6] ***State v. House*** 127 N.M. 151, 158, 978 P.2d 967, 974 (N.M., 1999)

charges. A mistrial was declared. Relatives of the accident victims and the District Attorney told the disparaged Taos County jurors following the mistrial, "The system is flawed. A child could have figured it out."[7]

The State's First Request for Transfer out of Taos County Following the First Trial

After the mistrial was declared, the State, claiming it could not get a fair trial in Taos County, filed a motion for change of venue supported by a pollster's report and testimony.[8] Judge Allen denied the motion on August 23, 1994, finding that transfer to the counties suggested by the State would result in a substantial reduction in the statistical probability that a Native American would appear on the jury and that the State failed in its burden to prove that the population of Taos County was biased against the State.

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[7] ***Twohig v. Blackmer*** 121 N.M. 746, 748, 918 P.2d 332, 334 (N.M., 1996).

[8] ***State v. House*** 124 N.M. 564, 567, 953 P.2d 737, 740 (N.M.App., 1997).

R.P. 550 (Order). On direct review in 1997 the New Mexico Court of Appeals agreed that, "the State's own polling evidence demonstrated that only 5% of the Taos County respondents in the poll had preconceived opinions in favor of Defendant and against the State."[9]

Following Judge Allen's recusal, Judge Richard Blackhurst was assigned to the case and he denied the State's motion to reconsider Judge Allen's venue decision.[10]

The Second Trial Outcome and the District Attorney's Public Remarks

A second three-week trial was held and the jury again deadlocked 9-3 in favor of conviction. A second mistrial was declared. The District Attorney vowed to try Mr. House a third time and "echoing sentiments he had expressed following the first trial, stated that

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[9] ***State v. House***, 124 N.M. 564, 572, 953 P.2d 737, 745 (N.M.App., 1997).

[10] ***State v. House*** 124 N.M. at 567, 953 P.2d at 740 (N.M.App., 1997).

those members of the House jury who had voted to acquit could have done so only out of sympathy for House."[11]

On November 30, 1994 the State filed its third request to transfer the case, claiming, " because of extensive and pervasive pretrial publicity, it could no longer receive a fair trial in Taos."[12] Before ruling on the Motion Judge Blackhurst retired and the case was reassigned to Judge James Blackmer.

The Gag Order Entered at the State's Request and the New Mexico Supreme Court's Ruling Vacating the Gag Order

Before a ruling on the State's request to transfer the case had been entered, the State filed request for a gag order, and on December 16, 1994, Judge Blackmer issued an Order prohibited the attorneys in the case from making comments about the case in the media. Petitioner's attorney sought a writ of superintending control to vacate the gag order based on federal

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[11] ***Twohig v. Blackmer*** 121 N.M. 746, 748, 918 P.2d 332, 334 (N.M., 1996).

[12] ***State v. House*** 127 N.M. 151, 158, 978 P.2d 967, 974 (N.M., 1999).

constitutional principles. In March 1995, immediately following oral argument, the New Mexico Supreme Court vacated the gag order from the bench. Later the Court filed a written opinion explaining that the gag order was an unconstitutional prior restraint of speech, and that it was unsupported by a factual foundation based on pretrial publicity.[13]

In its Opinion the Court relied on federal constitutional principles and characterized the pretrial publicity as it stood in December 1994, just two weeks after the State had requested the venue transfer at issue here.

> Unlike the defendant in ***Sheppard***, House was not to be tried where a majority of the publicity was generated. News stories published at the time of jury selection in House's first trial suggest that despite the tremendous amount of publicity the case had received in Albuquerque, residents of Taos, where House's first and second trials were held, knew almost nothing about the case. See Ed Asher, Gordon House? Who's That? Taos

[13] ***Twohig v. Blackmer,*** 121 N.M. 746, 918 P.2d 332 (1996).

> Asks, Albuquerque Trib., June 7, 1994, at A1. Further, the court, attorneys for the State, and attorneys for House had used another tool to combat potential prejudice caused by pretrial publicity -- extensive voir dire -- which also was available for use in the third trial. Jurors in House's first trial were selected from a venire of ninety persons. These ninety persons were questioned at length about their opinions on drinking and driving, migraine headaches, possible prejudices against Native Americans, and what they knew and thought about Gordon House.[14]

The New Mexico Supreme Court found that the State's evidence of excessive pretrial publicity failed to justify the prior restraint of a gag order.[15] At no time was defense counsel's speech found to be anything but appropriate attorney advocacy and the court relied on ***Gentile v. State Bar of Nevada,*** 501 U.S. 1030 (1991), a case that noted attorney advocacy includes denouncing overcharged cases.

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[14] ***Twohig v. Blackmer,*** 121 N.M. 746, 754, 918 P.2d 332, 340 (N.M., 1996).

[15] ***Twohig v. Blackmer***, 1996- NMSC-023, ¶¶ 11-28, 121 N.M. 746, 918 P.2d 332

The Hearing on the Venue Transfer Request and the Hearing to Decide Where to Move the Third Trial

About two months after entering the gag Order, on February 7, 1995, Judge Blackmer held a hearing on the State's venue transfer request--in Bernalillo County--not in Taos, the site of the first two trials. The defendant objected raising the same state and federal constitutional arguments that had been raised previously and cited by Judge Allen in August 1994 when rejecting the State's earlier request. ***See T.R. Vol. 32 at 21; T.R. Vol. 32 at pgs. 23-28***

The State presented no new evidence and Judge Blackmer relied on a transcript of the testimony of the state's polling expert from the August 1994 hearing, six months before. With the exception of a few comments made after the second trial, Judge Blackmer relied on the exact same evidence presented by the State in support of its venue transfer in August 1994 that was rejected by Judges Allen and Blackhurst, and its gag order request December 1994 that the New Mexico

Supreme Court found deficient just one month later. That evidence is carefully reviewed in **Petitioner's Supplemental Appendix A.** Nonetheless, Judge Blackmer granted the State's motion.[16]

Judge Blackmer held another hearing on March 30, 1995 to determine the County to which to move the trial. At the hearing, the State's polling expert testified based on his July 1994 poll that Dona Ana County residents who had heard of the case had a higher degree of bias against the defendant than those polled in the current venue, Taos County.[17] ***See Petitioner's Supplemental Appendix A, pgs. 10-15*** (review of pollster's testimony). The President of the Navajo Nation wrote a letter to Judge Blackmer, urging him to select a venue that would be sensitive to the defendant's cultural evidence.

> It would be a travesty of justice to see the third trial take place in a

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[16] ***State v. House***, 127 N.M. at 164, 978 P.2d at 980 (1999).

[17] ***State v. House*** 124 N.M. at 571, 953 P.2d at 744.

> community that has little or no familiarity with our customs or culture. We have often experienced misunderstanding and discrimination. We realize that stereotypes are common where contact and communication with our people does not occur. We ask that you consider the importance of having jurors who are not hostile to nor ignorant of our culture consider this case.[18]

Despite the polling results that demonstrated bias against the defendant in Dona Ana County,[19] and the diminution of Native Americans to less than 1%, and less bias against the State in Taos than existed against Defendant, Judge Blackmer chose Dona Ana County. The Court's Order contained a new conclusion: that the move to Dona Ana County was in part to ensure the *defendant* received a fair trial.[20] Defendant again strenuously objected and filed a petition for Writ of Superintending Control to the New Mexico Supreme Court

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[18] ***State v. House,*** 127 N.M. at 175, 978 P.2d at 991-92.

[19] ***State v. House*** , 124 N.M. at 572, 953 P.2d at 745.

[20] ***State v. House,*** 127 N.M. at 179, 978 P.2d at 995 (1999)

that was denied. ***State v. House***, 127 NM at 159, 978 P.2d at 975.

Judge Blackmer never visited Taos County. He never interviewed a single potential Taos County juror, or reviewed questionnaires of potential jurors from Taos County, nor is there any evidence that he relied on the *voir dire* transcripts from the prior two trials. ***See* Supplemental Appendix A.**

The Third Trial in Dona Ana County, the Guilty Verdicts and the Direct Appeal to the New Mexico Court of Appeals

Following the third trial the Dona Ana jury found Defendant guilty on all of the remaining counts. With the Nation watching on Court TV, Judge Blackmer imposed the maximum sentence, including a constitutionally suspect pyramiding of a single 2-year DWI recidivist enhancement provision into a 10-year enhancement, suspending three years of the basic sentence, leaving an actual sentence of 22 years imprisonment.[21]

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[21] **State v. House**, 127 NM 151, 159, 978 P2d 967, 975 (NM 1999).

Defendant timely appealed to the New Mexico Court of Appeals contending his state and federal constitutional rights were violated because the trial court had no factual basis for *presuming* Taos County residents were unable to impartially hear a case that had twice been heard in Taos County and because jury selection was accomplished in Taos without exhaustion of the jury panels during *voir dire* and impaneled without objection of either party. The New Mexico Court of Appeals agreed and reversed.

> [W]e believe the district court's premature decision to change venue was plagued by a lack of support in the record to justify removal of this case from Taos County without first attempting to select a new jury from Taos County. The district court having failed to make the attempt, we hold that the court abused its discretion in granting the State's motion for a change of venue.[22]

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[22] ***State v. House ,*** 124 N.M. at 577, 953 P.2d at 750 (N.M.App., 1997).

Review by the New Mexico Supreme Court on a Writ of Certiorari, and Reversal of the New Mexico Court of Appeals

The State sought, and the New Mexico Supreme Court granted, a Writ of Certiorari to the Court of Appeals. No new briefing was ordered. Because there was no additional briefing, the Supreme Court focused on the issue upon which the Court of Appeals had based its reversal of the convictions, the venue transfer.

Following oral argument the New Mexico Supreme Court reversed the Court of Appeals and reinstated the convictions.[23] The Supreme Court applied a modified version of a three-part test derived from ***Batson v. Kentucky,*** 476 U.S. 79 (1986) to the venue transfer facts to ascertain the presence or impact of any discriminatory animus noting, "[W]e have found surprisingly little jurisprudence on this question."[24]

The Sentencing Issues Before And After Remand and the Request for the Trial Judge's

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[23] ***State v. House***, 127 N.M. 151, 166, 978 P.2d 967, 982 (N.M., 1999).

[24] ***State v. House***, 127 N.M. 151, 177, 978 P.2d 967, 993 (N.M., 1999)

Voluntary Recusal and Motion for Disqualification

During the pendency of Petitioner's direct appeal, the New Mexico Court of Appeals decided ***State v. Landgraf,*** 1996-NMCA-24, 121 N.M. 445, *CERT DENIED,* 121 N.M. 375 (1996) wherein it was held that double jeopardy principles required that the rule of lenity be applied to multiple convictions under New Mexico's vehicular homicide statute, 1978 NMSA § 66-8-101(A) and (C). Mr. House timely raised the ***Landgraf*** issue on direct appeal but it was not ruled upon by either appellate Court. Upon return of the mandate to the trial court, Mr. House filed a Motion to Correct an Illegal Sentence pursuant to NMRA 1997 5-801 and ***Landgraf***. ***RP/1760-1783*** A scheduling conference was set. ***RP/1544*** (order).

At the scheduling conference Judge Blackmer was asked by one of Petitioner's counsel, Mr. Twohig, to voluntarily recuse. He declined to step down and issued a letter ruling. ***RP/01785; TR/1 at 5*** (court reciting oral request occurred on April 1, 1999 and subsequent letter ruling). Petitioner then filed a

motion to disqualify, or reassign, and requested a hearing before the Chief Judge or Presiding Criminal Judge pursuant to the local rules of criminal procedure on April 5, 1999. ***See e.g. RP/1546*** (motion to disqualify or for reassignment). The Chief Judge for the Second Judicial District refused to reassign the disqualification matter and Judge Blackmer determined he would step aside only if Ordered by the New Mexico Supreme Court. ***RP/1785*** At the sentencing hearing the following morning, April 6, 1999, ***TR/1*** at 3-4, Judge Blackmer was notified that a Petition for Mandamus had been filed with the N.M. Supreme Court that morning, ***see RP/1796,*** and Judge Blackmer declined to delay the hearing. ***RP/2019A*** (Writ materials; formerly sealed portion of record).

On April 6, 1999 Mr. House objected to proceeding with a judge that should be disqualified and to the trial judge's proposal to let prosecution determine the sentence. ***TR/1 at 5-6; RP/1545*** (court noting prosecution could "elect" the conviction it wished to

retain); ***TR/1 at 9*** He argued the existing judgment and sentence of 25 years was illegal and a post-***Landgraf*** Court was obligated to retain the reckless driving related convictions rather than the DWI-related convictions because, *inter alia*, there was ambiguity and constitutional doubt regarding the use of the DWI section of the statute reliance on which served only to increase the penalty by 66%.

Judge Blackmer brushed aside the defense contentions and selected the DWI-related convictions over the Reckless-Driving related convictions, and pyramided the 2-year enhancements. ***RP/2027-36***.

The Habeas Petition

Mr. House timely filed his habeas application and timely filed this appeal and now timely submits his opening brief.

STANDARD OF REVIEW

This case is reviewed according to the standards set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat.

1214 (Apr. 24,1996) Reversal is appropriate if the state's decision was based on an objectively unreasonable determination of the facts in light of the evidence presented in the state court proceeding, 28 U.S.C. § 2254(d)(2); ***Miller-El v. Cockrell***, 537 U.S. 322, 123 S. Ct. 1029, 1041 (2003), or if the state court's decision was "contrary to, or involve[s] an unreasonable application of, clearly established Federal law" as determined by "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision," ***Lockyer v. Andrade,*** 583 U.S. 63, 71 (2003).

SUMMARY OF ARGUMENT

The theme that runs throughout this case is the deprivation of substantial rights of a Navajo man whose repeated, highly publicized prosecutions painted him as the scapegoat for New Mexico's nationally recognized problem with drinking and driving in the 1990s. *See e.g. New York Times, "Old New Mexico Woe, Drinking and*

Driving, is Vexing State Anew" Section 1, pg. 37 (Dec. 4, 2005) (citing uproar from this case).

Following two hung juries in the case, and over the strenuous objection of the defense and prior rejections by Judges Frank Allen and Richard Blackhurst of the state's evidence in support of its repeated attempts to have venue transferred out of Taos County, the third judge assigned to the case Judge Blackmer -- without even visiting Taos County[25] -- determined that pretrial publicity had rendered the entire community presumptively prejudiced and in February 1995 he granted the state's request for venue transfer solely because of prejudice to the state's case. ***See R.P. at 0663*** **(**court order granting State's motion claiming it would be unable to get fair trial in Taos County); ***see also State v. House***, 127 N.M. 151, 158, 978 P.2d 967, 974 (N.M., 1999) (noting procedural history of denials of state's venue transfer requests); **RP/0718** (court

[25] ***See e.g.,*** **RP/0711** (court noting that "this judge did not attend or participate" in prior trial activity.)

order noting ongoing defense objection to any venue transfer.) The State proposed the trial be moved to one of three New Mexico counties, each of which resulted in a significant decrease in Indian population from Taos County. ***See R.P. at 0717***. Two months later Judge Blackmer issued an "Order Changing Venue For Trial, and Order on Jury Selection in New Venue" wherein he added he was overriding the defendant's objection to the venue transfer because he had determined it was in defendant's best interest to be tried in Dona Ana County. ***R.P. at 0714*** (finding it would be difficult for "one or both Parties to obtain a fair and impartial THIRD trial")

Petitioner demonstrated by clear and convincing evidence, that was uncontroverted at any stage of these proceedings, that the State sought the venue transfer to Dona Ana county after it could not persuade two different Taos County juries to convict and in reliance on evidence that Dona Ana County had less than 1% Indian population and the State's own polling evidence

that demonstrated a higher percentage of preformed opinions of defendant's guilt as well as a higher degree of bias against the defendant than in Taos County.

Issue One:

Batson v. Kentucky, 476 U.S. 79 (1986) prohibits the State from offensively using state venue transfer statutes to transfer a case to a venue that for the purpose of depriving a defendant of any practical possibility that members of his race will be in the venire from which the *petit jury* is selected. The State trial court's failure to undertake a ***Batson*** inquiry, and the New Mexico Supreme Court's misapplication of the ***Batson*** inquiry it undertook on appeal, impermissibly allowed the State to achieve unlimited strikes against Indian jurors. The U.S. District court determined that the application of ***Batson's*** principles to venue transfer was not cognizable on Habeas review because it was not "clearly established federal law" and because it did not find the New Mexico Supreme

Court's "modified ***Batson***" review an "unreasonable application" of the U.S. Supreme Court's precedent.

Issue Two:

Petitioner's Sixth and Fourteenth Amendment rights were violated when the New Mexico trial judge presumed that the Taos County venire bore irrevocable and fixed opinions of both parties such that a fair and impartial jury could not be seated following two jury trials that had empanelled juries without incident and that resulted in hung juries. The New Mexico Supreme Court and United States District Court misapplied ***Mu'Min v. Virginia***, 500 U.S. 415 (1991) to conclude that a trial judge may *presume* community wide perceptions and attitudes foreclose the possibility of a fair trial in the absence of *voir dire* because the trial judge is in the best position to determine the possibility of a community's irrevocable bias. The N.M. Supreme Court's review of the facts was objectively unreasonable and the lower federal court, though troubled. It is well settled that the United States Supreme Court has

reserved disqualifying presumptions of bias in an entire venire to those cases where clear and convincing record evidence demonstrates that but for the venue transfer, the trial would occur in a trial atmosphere utterly corrupted by pretrial publicity. That standard was not met here.

Issue Three:

Petitioner's Sixth and Fourteenth Amendment rights were violated when the New Mexico Supreme Court applied a harmless error analysis to a venue transfer arising from intentional state action that was admittedly for the purpose of dislodging a defendant to a venue with a predisposition toward guilt, and that reduced the members of defendant's race to less than 1%. The use of the venue transfer statute as an end-run around the Fourteenth Amendment and ***Batson*** and to obtain a venue skewed towards guilt constituted a "structural error" that is not subject to harmless error analysis under ***Arizona v. Fulminante***, 499 U.S. 279, 309 (1991)

Issue Four:

New Mexico's vehicular homicide statute, NMSA 1978 §66-8-101 establishes several equal and alternative grounds for conviction and attaches a recidivist enhancement to only one of the alternatives. Because the statute provides no guidance to a trial court regarding which ground to retain when a jury convicts on more than one alternative ground, the statute is ambiguous and due process minima expressed in the rule of lenity and doctrine of constitutional doubt barred the trial court in this case from retaining the second of two alternative criminal convictions under the statute because the only distinction between the two alternatives was the one selected resulted in a mandatory 2 year penalty increase.

The state trial judge stacked the 2-year recidivist enhancement four times to create an additional 10 year penalty. The New Mexico Court of Appeals violated clearly established federal law when it determined the alternative ground for conviction that carried no

enhancement was a "lesser included" offense that could be ignored. The federal Magistrate erred when it affirmed this result because well settled federal law requires that the rule of lenity be applied to ambiguous penal statutes and because it is impossible that an equal, alternative ground for conviction can be a "lesser included offense."

Issue Five:

Substandard Due Process under the Federal Constitution was provided Petitioner when the Presiding Judge of the Criminal Division of the Bernalillo County District Court, and the Chief Judge for the District Court and the New Mexico Supreme Court, all refused to hold an Evidentiary Hearing or hear a Motion for Disqualification and Case Reassignment or an Extraordinary Writ petition after the trial judge refused to voluntarily step aside despite a *prima facie* showing that his continued handling of the case was improper. The Court of Appeals erred when it found Petitioner waived the issue on appeal and the

Magistrate erred when it affirmed this ruling as a finding of fact that was not clearly erroneous.

ARGUMENT

ISSUE 1: Application of the Fourteenth Amendment and *Batson v. Kentucky* to Venue Transfer Decisions

Petitioner argued that The Fourteenth Amendment and ***Batson*** forbids the State to use New Mexico's race-neutral venue transfer statute offensively to obtain a venue predisposed to convict and to eliminate members of the defendant's race from the venire. The State's sole rebuttal has been that "no post-***Batson*** case decision of the United States Supreme Court has extended the holding of that case to the selection of a venue." ***State's Answer Brief, District Court, Pleadings Tab 47*** at 10. The U.S. District Court agreed with the State and concluded that "clearly established Federal law does not extend the ruling of ***Batson v. Kentucky*** to the State's motion for a change of venue." ***House v. Bravo, Slip Op.*** *at 6* (No. CV 02-0178 MV/ACT).

A. Equal Protection Assurances Apply to All Stages of Criminal Proceedings that Implicate the Fairness of the Trial Process Including the Selection of the Venue.

> [A] defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct.

Powers v. Ohio, 499 U.S. 400, (1991); ***accord Swain v. Alabama***, 380 U.S. 202 (1965).

> [R]ace-based exclusion is no more permissible at the individual petit jury stage than at the venire stage -- not because the two stages are inseparably linked, but because the intransigent prohibition of racial discrimination contained in the Fourteenth Amendment applies to both of them.

Holland v. Illinois, 493 US 474, 480 (1990).

> Since the Fourteenth Amendment ***protects an accused throughout the proceedings bringing him*** *to justice*, the State may not draw up its jury lists pursuant to neutral procedures, but then resort to discrimination at other stages in the selection process. (emphasis added by Petitioner) (citations and quotation marks omitted)

See Batson, 476 U.S. at 88. The United States Supreme Court has clearly established the simple and obvious proposition that the protections afforded by the Fourteenth Amendment are at work in *all the proceedings* of public criminal prosecution, including venue transfers.

1. The U.S. District Court's Reliance on the Supreme Court's Denial of Certiorari on Direct Appeal in *Mallet v. Missouri*, and the Eighth Circuit's Subsequent Denial of Mr. Mallet's Habeas Petition in *Mallet v. Bowersox*, was an Unreasonable Application of Clearly Established U.S. Supreme Court Authority.

The District Court relied solely on Justice Marshall's dissent from a denial of *certiorari* in ***Mallet v. Missouri,*** 494 U.S. 1009 (1990), on direct appeal and a subsequent habeas claim by Mr. Mallet that was rejected by the 8th Circuit. ***House v. Bravo, District Court Slip Op****. at 6.* Justice Marshall's dissent from the denial of *certiorari* stated in pertinent part:

> Just as state prosecutors may not use preemptory challenges to exclude members of the defendant's race from

> the jury (citation omitted), state trial courts may not transfer venue of the trial to accomplish the same result by another means.

Mallet v. Missouri, 494 U.S. 1009, (Marshall, J. dissenting).

Batson and not ***Mallet*** is the controlling law, and the denial of *certiorari* is an invalid basis for rejection of Petitioner's argument under 28 U.S.C. § 2254. The federal courts must apply "clearly established Federal law" and the United States Supreme Court has repeatedly noted that a "denial of the petition does not constitute a ruling on the merits." ***Barber v. Tennessee***, 513 U.S. 1185 (1995) (Stevens, J. noting "On occasion, it is appropriate to restate the settled proposition that this Court's denial of certiorari does not constitute a ruling on the merits."); ***United States v. Carver***, 260 U.S. 482, 490 (1923). While acknowledging this principle, the U.S. District Court circumvented it by concluding a denial of *certiorari* "does signify that the Court explicitly chose not to answer the question." ***House v. Bravo, Slip***

Op. *at 6.* Undersigned counsel was unable to locate authority that establishes the denial of *certiorari* constitutes a finding that federal law is unsettled under 28 U.S.C. § 2254.

The U.S. District Court also cited the Eight Circuit's treatment of Mr. Mallet's challenge to the venue transfer in his case. ***House v. Bravo, Slip Op.*** *at 6.* Presumably the court thought it supportive of its conclusion that ***Batson's*** application to venue transfers is not well settled. But the trial court is mistaken because Mr. Mallet's case did not present the issue presented in this case, that deliberate and purposeful state action distorted the racial composition of the venire. ***Mallet v. Bowersox***, 160 F.3d 456, 460 (8th Cir. 1998). In fact, the Eighth Circuit's disposal of Mr. Mallet's claim reveals the strength of Mr. House's claim.

First, the venue transfer Mr. Mallet objected to was actually requested by him, so there was never any question of the motive of the State or trial court as

there is in Mr. House's case. Second, the New Mexico Supreme Court agreed with Mr. House that a *prima facie* showing was made that the State sought the transfer for discriminatory purposes, thus necessitating the ***Batson*** inquiry. Third, the New Mexico Supreme Court undertook a ***Batson*** inquiry and it appears the Missouri court simply concluded there were no facts offered to support Mr. Mallet's race-based claim and rejected it.

Finally, and most importantly, the key argument advanced by Mr. Mallet was that he was entitled to a particular racial composition of the venire -- something Mr. House does not argue. The Eighth Circuit's denial of Jerome Mallet's Habeas petition does not establish that application to venue transfers of the the Fourteenth Amendment and ***Batson's*** analytic framework is not well settled federal law.

B. The U.S. District Court Misapplied the "clearly established federal law" Principle when it Concluded that the Fourteenth Amendment's Protections as Implemented by the Analytic Framework Adopted in *Batson v. Kentucky* Does not Apply to Venue Transfers Obtained under State Statutes.

The District Court has interpreted the meaning of "clearly established federal law" under § 2254 too narrowly. In ***Williams v. Taylor***, 529 U.S. 362 (2000), the Supreme Court held that "clearly established Federal law does not mean that the Supreme Court must have decided the very case that a state court has before it as long as the State court correctly identifies the *governing principles* from Supreme Court precedent…." ***Williams***, 529 U.S. at 362 (emphasis added by Petitioner).

"[A]pplying existing precedent to a different set of facts *is not a new rule* if the factual differences do not change the force with which the precedent's underlying principle applies." ***See Wright v. West***, 505 U.S. 277, 304 (1992) (emphasis added). The selection of venue in a criminal case is inextricably part of the

process leading to the selection of the jury and the proceedings bringing the defendant to justice. ***See e.g.*** Fed.R.Crim.P. 21(a) (venue is a key component of a fair trial and an unbiased jury and transfer is required "if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial.").

The application of the Fourteenth Amendment and ***Batson***'s analytic principles to the offensive use of a State's use of a race-neutral venue transfer statute does not create a new rule since the factual differences between venue transfers and jury selection do not change the force with which the underlying principle applies. ***Holland v. Illinois***, 493 U.S. 474, 480 (1990).

C. The New Mexico Supreme Court's Application of *Batson* to Venue Transfers Demonstrates it is Clearly Established Federal Law.

The New Mexico Supreme Court held:

> The right to equal protection prevents a trial Court or a prosecutor from

> intentionally choosing a venue so as to exclude from the venire persons of a particular race.

House, 127 N.M. 151, 177, 978 P.2d 967, 993 (1999).

> Selecting a specific venue to purposefully preclude a particular race from a petit jury is just as unconstitutional as using peremptory challenges to systematically exclude a particular race from a petit jury.

House 127 N.M. at 177; ***State v. House***, 127 N.M. 151, 178, 978 P.2d 967, 994 (N.M., 1999)("we base our *Batson*-venue analysis upon federal equal protection principles.")

The U.S. Supreme Court has held that a principle constitutes clearly established federal law if a State court would have felt compelled by existing precedent to conclude that the rule the defendant seeks was required by the Constitution. ***Caspari v. Bohlen***, 510 U.S. 383, 390 (1994) (quoting ***Saffle v. Parks***, 494 U.S. 484, 488 (1990). The New Mexico Supreme Court's reliance on the Fourteenth Amendment and ***Batson*** bolsters the assertion that ***Batson's*** legal principle is

clearly established federal law.[26] The U.S. District Court erred in holding that this case does not involve clearly established federal law.

D. The U.S. District Court Failed to Follow Clearly Established Federal Law when it Concluded that the New Mexico Supreme Court's "Modified Batson Analysis" was not Objectively Unreasonable.

Petitioner contended that the New Mexico Supreme Court's stunted application of the principles of ***Batson*** was an objectively unreasonable application of well settled federal law because it substituted an abuse of discretion review standard under the State's venue transfer statute for the critical third step of a ***Batson*** review. ***State v. House***, 127 N.M. 151, 179, 978 P.2d 967, 995 (1999)(relying on its "discussion of the venue order" to meet step three review); ***but see Id.*** 127 N.M. at 178, 978 P.2d at 994 ("we base our *Batson*-

[26] The New Mexico Supreme Court is not the only state court to conclude that applying *Batson*'s legal principle to venue changes is required by the Constitution. ***See Osmulski v. Becze***, 638 N.E.2d 828, 834(Ind. Ct. App. 1994)(applying ***Batson,*** "the end result, the exclusion of African-Americans from jury service, is the same whether a peremptory challenge or an automatic change of venue is the tool employed.").

venue analysis upon federal equal protection principles.")

The deferential review standard was coupled with the adoption of a burden of proof for a venue transfer movant under the state statute that required only that a "reasonable probability of prejudice," in the existing venue arising from pretrial publicity be shown to justify the transfer. ***See State v. House***, 127 N.M. 151, 165, 978 P.2d 967, 981 (N.M., 1999) If strictly adhered to, New Mexico's approach nowhere requires that the prima facie case demonstrating discriminatory animus in the venue transfer request be explored in a manner that is sufficiently searching to ensure the Fourteenth Amendment's protections were observed. ***See e.g. Johnson v. California*** 125 S.Ct. 2410, 2418 (2005)(noting *Batson* framework "is designed to produce actual answers" to simple questions); ***State v. House*** 127 N.M. 151, 167, 978 P.2d 967, 983 (N.M., 1999) (noting N.M. follows a "different standard of proof" than in federal court to presume an entire venue may be

disqualified and justify a venue transfer) The New Mexico approach nowhere ensures that the careful fact-sifting that is clearly established under step three of a ***Batson*** analysis be undertaken.

At first blush New Mexico's approach appears to allow the trial court to evaluate the "the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." ***Miller-El v. Cockrell ,*** 537 U.S. at 324. But if the predicate for a venue transfer is based, as here, a presumption of irrevocable bias in the venire, there is no meaningful check on the trial court's presumption. Here it allowed a trial judge who never even visited the venue in question to meet the U.S. Supreme Court's requirement that step three deference be based on first hand exposure to the community tainted by prejudicial and disqualifying pre-trial publicity.

The U.S. District Court relied on two features of the New Mexico Supreme Court's decision to reject

Petitioner's arguments. First, it concluded that the state had offered "race neutral" reasons for the venue transfer based on pretrial publicity. ***Slip Opinion* at 9.** Second, it concluded that while it was "somewhat problematic" that the New Mexico Supreme Court had determined that a proper exercise of discretion under the New Mexico venue transfer statute "necessarily" established that the transfer was based on "race-neutral" reasons, nonetheless there was no unreasonable application of federal law because the appellate court reached a conclusion about the "trial court's state of mind" and that was all that was required. ***Slip Opinion* at 9.** The subtle shift from assessing the prosecutor's reasons to those of the trial court meant that nowhere was a meaningful review of the race-based issues addressed head on. The New Mexico approach also overlooks that at step two of ***Batson*** the prosecution must offer "permissible race-neutral justifications." ***Johnson v. California*** 125 S.Ct. 2410, 2416 (2005). A modified ***Batson*** test that allows the offensive use of a

venue transfer statute to purposefully select and obtain a venue with less than 1% Indians, as well as to obtain a venue of non-Indians that the State's own polling data established exhibited a greater predisposition to find Petitioner guilty than the potential jurors in Taos County, without a single evaluation of anything but pretrial publicity, cannot stand. ***See T.R. Vol. 16 at 71-72 and Vol. 33 at 87*** (Indian population less than 1% in Dona Ana); ***see also R.P. at 550-51*** (Judge Allen's finding of fact that transfer from Taos to counties proposed by prosecution would cause a "substantial reduction" in the likelihood of a Native American in the venire and on the jury); ***see T.R. Vol. 33 and 65*** (pollster admits helping determine venue more likely to convict); ***see T.R. Vol. 16 at 75-77*** (pollster admitting Dona Ana is more biased than Taos). An appellate review that permits such a result can hardly be considered to have evaluated the evidence for "permissible" or "race-neutral" strategic goals.

Moreover, the record was uncontroverted that the Prosecutor's improper and inflammatory remarks had tainted the media coverage and that the trial court noted but did not evaluate this feature of the venue transfer.[27] ***See, R.P. at 499-502*** (defense expert showing negative impact of D.A.'s remarks on defendant); ***T.R. Vol. 16 at 51-52*** (polling expert admitting D.A.'s remarks impacted fair trial); ***see also RP/714-15*** (court order relying in part on reactions of citizens in the Taos County venue to prosecutor's public remarks); ***see also Petitioner's Supplemental Appendix A*** (reviewing each piece of cited evidence) This was brushed aside by the New Mexico Supreme Court.

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[27] ***See RP/690-91*** ("The district attorney's repeated and very public condemnations of Defendant's conduct and claims and defenses, and of his counsel's conduct and defenses and claims—especially in 1993 through June 1994—were unfair and improper * * * The prosecutor's unfortunate (but far less inflammatory) comments after the second hung jury regarding "social" issues are not likely to prejudice a third jury that would be empanelled nearly six months later and likely won't remember them"). ***See also R.P. at 632-638*** (defendant's response to motion for gag order and disciplinary board response letter Chief Disciplinary Board Counsel found D.A. Schwartz' remarks "ill advised and ...better left unsaid." and disapproved his "tendency to comment on the merits of pending cases").

State v. House 127 N.M. 151, 171, 978 P.2d 967, 987 (N.M., 1999).

In sum, the New Mexico Supreme Court noted no "express use" of a ***Batson*** inquiry by the trial court and held nonetheless, "most of the trial court's reasons [to move the trial] are supported by substantial evidence and show no abuse of discretion." ***State v. House***, 127 N.M. at 179, 978 P.2d at 993. In light of the evidence that only 5% of the Taos County respondents in the State's poll had preconceived opinions in favor of Defendant and against the State, and less than 1% Indian population in Dona Ana, the New Mexico Supreme Court's listing of the number of news articles etc. as a substitute for a ***Batson*** review was an objectively unreasonable determination of the facts and a misapplication of well settled federal law.

1. Misapplication of Governing Federal Legal Principles is Ground for Granting the Requested Writ.

The U.S. Supreme Court has empowered lower courts to grant writs when the controlling legal principle is

unreasonably applied by lower courts. ***Wiggins v. Smith***, 123 S.Ct. 2527, 2535 (2003). The U.S. District Court's acceptance of New Mexico's modified application of ***Batson***, is an unreasonable application of well settled federal law.

2. The Substitution of an Abuse of Discretion Review under the State Venue Transfer Statute for the Careful Standards Established by *Batson* is an Unreasonable Application of a Clearly Established Legal Principle.

The New Mexico Supreme Court failed to apply clearly established Federal law:

> [A] trial Court's findings of fact that a fair trial cannot be obtained in the current venue and that an alternate venue is free from exception *necessarily determines* that a change of venue is justified by race-neutral reasons, thereby satisfying step two of the ***Batson*** test.

House, 127 N.M. at 178, 978 P.2d at 994 (emphasis added by Petitioner). Because the New Mexico Supreme Court did not add any effective step to its analysis that corresponds to ***Batson's*** step three, its approach is an unreasonable application of well settled federal law.

The U.S. Supreme Court has recently expressed doubts about the substitution of state law standards in the context of ***Batson.*** "Although we recognize that States do have flexibility in formulating appropriate procedures to comply with ***Batson***, we conclude that California's "more likely than not" standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." ***Johnson v. California*** 125 S.Ct. 2410, 2416 (U.S.Cal.,2005)

The distance between the fact intensive review required under ***Batson's*** three-step approach and the "abuse of discretion" review undertaken by the New Mexico Supreme Court here, where the trial court did not undertake a Batson-type step three, is vast:

> On appeal, all disputed facts are resolved in favor of the successful party, all reasonable inferences indulged in support of the verdict, all evidence and inferences to the contrary disregarded, and the evidence viewed in the aspect most favorable to the verdict.

State v. House 127 N.M. 151, 161, 978 P.2d 967, 977 (N.M., 1999). But the U.S. Supreme Court has said,

"[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'" ***Batson,*** 476 U.S. at 93 (quoting ***Arlington Heights,*** 429 U.S. at 266). While New Mexico is free to vest its trial courts with discretion to transfer venue, it may not allow inadequate review that fails to enforce a defendant's rights secured by the Fourteenth Amendment.

Moreover, the New Mexico Supreme Court provided two different standards for review of venue transfers: one for dislodging a defendant from the constitutional vicanage and a lesser standard for dislodging when the venue is not the constitutional vicanage. The former is quite a bit more strict. ***State v. House*** 127 N.M. 151, 165, 978 P.2d 967, 981 (N.M., 1999)(prosecutor must "prove with clear and convincing evidence that a fair trial in that district is a practical impossibility.")

The use of two separate evidentiary standards for the same constitutional question under equal protection

principles as implemented by ***Batson*** is contrary to well settled federal principles. The defendant--like Petitioner here--gets less protection of his federal rights secured by the Fourteenth Amend. and ***Batson*** than if he were being tried in the constitutional vicinage. Moreover, it makes the move from Bernalillo to Taos to ensure a constitutionally fair trial that both parties agreed was necessary, a costly exercise of a fundamental right for the defendant. This kind of Hobson's choice is contrary to well settled federal law.

The U.S. Supreme Court gives great deference on review of a step three ***Batson*** analysis because the trial court makes the key step three evaluation based on the trial court's own observations. ***Miller-El***, 123 U.S. at 1041. Here, there was no trial Court application of ***Batson*** nor was any finding of fact entered on this aspect of the Petitioner's challenge. Nor were the allegedly biased veniremen examined or observed. If the prosecution's claim to be victimized

by pretrial publicity is but a pretext to dislodge the defendant, as here, from a venue that had twice rejected the State's case, it could not be exposed under the N.M. Supreme Court's approach without voir dire.

The New Mexico Supreme Court significantly understated the problem when it noted that "there was no express use of such [***Batson***] a test by the trial Court." ***House***, 127 N.M. 151, 178, 978 P.2d 967, 994 (1999). Under the approach taken by the New Mexico Supreme Court and the U.S. District Court on review, step three of ***Batson*** was by appellate review of the record – no prosecutor was ever asked to justify its venue transfer request against the backdrop of the change in racial composition of the venire, no demeanor clearly measured, no credibility assessed nor was the simple step of *voir dire* taken to investigate the need for the venue transfer. The New Mexico Supreme Court actually bootstrapped *no finding* of fact by the trial Court into a record that was sufficient to conclude

there was no discriminatory animus. The New Mexico Supreme Court's conclusion that there was no discriminatory purpose constituted both an objectively unreasonable determination of the facts in light of the evidence presented and a misapplication of well settled federal law.

3. The U.S. District Court's Review of the Record was Insufficient under *Miller-El* v. Cockrell.

> ***House*** presented a *prima facie* case of racial discrimination with his cultural arguments and his evidence that, after he twice had a hung jury in a community that had a significant Native American population, the State advocated the move to a venue with few Native Americans.

State v. House, 127 N.M. at 178, 978 P.2d at 994. The facts underpinning the *prima facie* case are key to determining how to sift and calibrate review of the race-neutral explanations of the State.[28] ***Miller-El v.***

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[28] Although the U.S. District Court noted that ***Miller-El v. Cockrell***, 123 S.Ct. 1029 (2003) was decided after the New Mexico Supreme Court's decision that is challenged in this Habeas case and cannot alter its analysis, ***Slip Op. at 8, Miller-El*** is nonetheless good authority to the extent that it is cited not for new rules of

(footnote continued to next page)

Cockrell, 123 S.Ct. 1029 (2003) ("It goes without saying that this includes the facts and circumstances that were adduced in support of the *prima facie* case.")

The ***Miller-El*** Court cited ***Batson***, 476 U.S., at 94, for the proposition that "Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the result bespeaks discrimination." ***Accord Vasquez v. Hillery***, 474 U.S. 254, 259, 106 S.Ct. 617(1986). In ***Miller-El***, 91% of the eligible African-American venire members were eliminated. Here, the State eliminated an even higher percentage of Indians from the venire. ***State v. House***, 127 N.M. 151, 175, 978 P.2d 967, 991 (N.M., 1999). ("The trial court and all the participants in this

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(footnote continued from previous page)
law, but for the U.S. Supreme Court's insistence that *existing* rules of law governing habeas review be meaningfully applied. ***See e.g. U.S. v. Gonzalez-Huerta,*** 403 F.3d 727, 750 (10th Cir. 2005) citing ***O'Connor v. Ohio***, 385 U.S. 92, 93, 87 S.Ct. 252, 17 L.Ed.2d 189 (1966) (refusing to punish criminal defendant for failing to anticipate a new constitutional rule recognized during the pendency of his direct appeal)

trial were well aware that Taos County has a 6.5% Native American adult population while Doña Ana County has only about 0.8%.")

ISSUE 2: Clearly Established Federal Principles Require *Voir Dire* be Undertaken by the Trial Judge that Must Rule on a Venue Transfer Request Before the Judge may Presume an Entire Venire is Irrevocably Tainted by Pretrial Publicity and Grant the Prosecution's Request for a Venue Transfer Over the Defendant's Objection.

The U.S. District Court rejected Petitioner's contention that well settled federal law establishes *voir dire* is essential to determining disqualifying prejudice in the entire venire as a result of pretrial publicity relying on ***Mu'Min v. Virginia***, 500 U.S. 415, 427 (1991). S***ee also State v. House***, 127 N.M. 151, 168, 978 P.2d 967, 984 (N.M., 1999)(holding if pretrial publicity has rendered a fair trial improbable then court may change venue without conducting *voir dire*.).

The New Mexico Supreme Court concluded that *voir dire* in Taos County was unnecessary to determine

potential juror bias based on pretrial publicity, but was critical in determining racial bias in Dona Ana.

> Only by conducting voir dire, and listening to the racial opinions of individual potential jurors, can it be demonstrated that a particular venue cannot provide a jury free from racial prejudice. Through careful voir dire, fair-minded jurors can most likely be found, even in a community which has few members of the defendant's race. That is what happened in this case.

State v. House 127 N.M. 151, 179, 978 P.2d 967, 995 (N.M., 1999)

The U.S. District Court held, relying on Mu'Min, that federal law does not require *voir dire* to determine juror impartiality and that a trial judge may presume an entire venire is prejudiced without conducting *voir dire* because "it is a factual matter that the trial court is best suited to decide." ***See Slip Opinion*** *at p. 11*.

Misapplication of Mu'Min v. Virgina

Mu'Min v. Virginia was not a case that focused on the authority of a court to presume an entire venire was prejudiced, it was a case about the extent and

scope of *voir dire*, not whether *voir dire* is required. ***Mu'Min v. Virginia*** 500 U.S. 415, 432 (O'Connor, J., concurring)

Contrary to the U.S. District Court's use of it here, the ***Mu'Min*** court found the quantum and quality of publicity should guide the trial court's discretion in "deciding how detailed an inquiry to make of the members of the jury venire." ***Mu'Min***, 500 U.S. at 427. The ***Mu'Min*** Court did not conclude that *voir dire* is unnecessary, it did not conclude community wide prejudice could be determined absent *voir dire,* but instead found that *voir dire* must not be perfunctory if it is to dispel claims of prejudice and racial bias. ***Mu'Min*** should be read as establishing that *voir dire* transcripts are required to sustain any determination of community wide prejudice.

The value and applicability to this case of *voir dire* was emphasized by the U.S. Supreme Court when it concluded that the a seven month time lapse, "clearly rebuts any presumption of partiality or prejudice that

existed at the time of the initial trial." ***Patton v. Yount***, 467 U.S. at 1035. Evidence of prior partiality in a venire is rebutted by the passage of time as should have been found in this case.

Finally, the quotation from ***Mu'Min*** that the U.S. District Court relied upon here, ***Slip Opinion at 11***, notes the value of "conducting" *voir dire* and that only then is the trial court in the key fact finding role that would allow its own perceptions and sense of the media in the locality to become relevant. But such concerns are inapplicable in this case because Judge Blackmer never even visited Taos County. It is contrary to all U.S. Supreme Court cases to defer to a trial judge's presumption of prejudice when that judge that never even visited the venue or observed a venire person. ***See Hernandez v. New York***, 500 U.S. 352, 364-65 (1991)(noting reason for deference is trial court's first hand exposure to demeanor/credibility); ***accord Anderson v. City of Bessemer***, 470 U.S. 564 (1985).

Judge Allen, who conducted the first trial, Judge Blackhurst, who conducted the second trial, and the New Mexico Court of Appeals all concluded that the Judge Blackmer's 1995 presumption of prejudice in this case was an objectively unreasonable determination of the facts based on the evidence.

> However, after carefully reviewing the extensive record in this case and considering each of the factors relied upon by the district court, individually and as a whole, we do not believe the record supports the district court's decision to take the drastic step of changing venue without first attempting to select a new jury from Taos County."

State v. House, 124 N.M. 564, 571, 953 P.2d 737, 744 (N.M.App., 1997) (reversed).

Finally, the ***Mu'Min*** Court said that exposure to pretrial publicity is constitutionally insignificant unless the juror irrevocably believed the Defendant guilty. ***Mu'Min***, 500 U.S. at 430. As can be seen in ***Supplemental Appendix A***, the State trial court cited nothing indicating disqualifying prejudice in Taos County. The U.S. District Court dismisses this by

pointing to ***Irvin v. Dowd***, 366 U.S. 717 (1961) and ***Sheppard v. Maxwell***, 384 U.S. 333 (1966) as cases where pretrial publicity was extreme and a venue transfer was required.

Clearly established federal law recognizes two means of demonstrating a venire is so prejudiced by pretrial publicity that a fair and impartial jury cannot be seated and a criminal conviction must therefore be reversed. "[T]he trial setting was inherently prejudicial or that the jury selection process permitted an inference of actual prejudice." ***Dobbert v. Florida***, 432 U.S. 282, 302 (1977). The "trial setting" cases have nothing to do with Petitioner's case, that was tried twice to hung juries without incident.

That leaves only cases where the "jury selection process" discloses actual prejudice. Judge Blackmer did not interview any potential jurors. ***See also Jordan v. Lippman***, 763 F.2d 1265, 1276 (11th Cir. 1985) (noting "the fundamental importance of voir dire as a

tool for insuring the right to an impartial jury"). Prejudice can be shown through admitted prejudice or the demeanor and credibility of the venire during voir dire. ***U.S. v. Campa*** 419 F.3d 1219, 1260 (C.A.11 (Fla.),2005) (rehearing granted Oct. 31, 2005) citing ***Patton***, 467 U.S. at 1029, 1038, 104 S.Ct. at 2888, 2892.

In this case, the failure to conduct *voir dire* of a single venireperson and relying on little more than a poll taken before a prior trial and some news articles, constitutes a record under ***Mu'Min*** that is not sufficient to disqualify a single juror, much less presume an entire an entire community incapable of providing a fair and impartial jury. In the absence of any argument that the trial setting was like that in ***Rideau v. Louisiana***, 373 U.S. 723 (1963), a venue transfer without voir dire is contrary to well settled federal law. ***See e.g.*** 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 22.2(a), at 764 (1984) ("***Rideau*** is the only case holding "the pretrial

publicity is so pervasive that it is not curable by the most careful voir dire, so that a change of venue is a necessary remedy."); ***Id.*** ("it remains common practice after ***Rideau*** for trial Courts to refuse to rule on a request for a change of venue until after an attempt has been made to select an impartial jury[.]").

In this case the State argued in February 1995,

> Again, per section 38-3-3, the language says that the change of venue shall be granted where there's the existence of widespread and general acceptance and knowledge and public's excitement.

T.R.Vol. 32 at 9 (prosecution's argument). The lower courts that credited this argument, coming after the second trial and seven months after the last polling data that showed more bias against the defendant than the State, failed to reasonably evaluate the facts of record and failed to apply the governing principles of federal law established by the Supreme Court.

> Petitioner in this case has simply shown that the community was made well aware of the charges against him, and asks us on that basis to presume unfairness of constitutional magnitude

> at his trial. This we will not do in the absence of a "trial atmosphere utterly corrupted by press coverage."

Dobbert, citing ***Murphy v. Florida,*** 421 U.S. at 798.

Because the State trial judge in this case presumed irrevocable prejudice in Taos approximately six months before the third trial was to take place, and without the benefit of *voir dire,* or current poll information, and without examining a single piece of evidence that had not already been rejected by two trial judges before the second trial (other than the fact of a hung jury in trial number 2), it was utterly inconsistent with well established Federal law regarding disqualifying pretrial prejudice.

A. The New Mexico Supreme Court's Reliance on its Construction of the New Mexico Venue Transfer Statute does not Bar Federal Review of a State Trial Court's Presumption of Community-Wide Prejudice.

The U.S. District Court also concluded that Petitioner's arguments must fail because the New Mexico Supreme Court rejected Petitioner's direct appeal in part based on its construction of the New Mexico's

venue transfer statute and that such construction is beyond the reach of a federal court on Habeas review. ***Slip Opinion at p. 13.***

This conclusion overlooks that the New Mexico Supreme Court's analysis followed federal principles regarding the evaluation of pretrial publicity and that the venue transfer decision cannot be divorced from the State's motivation to get away from Taos County and its Indian jurors and to a venue already tainted by pretrial publicity.

No prior New Mexico case recognized the difference between presumed and actual prejudice and the record failed to show a single juror was irrevocably tainted. ***See Mu'Min, Patton v. Yount; Irvin v. Dowd.*** In the absence of a record of tainted venirepersons, the affirmance of the venue transfer stands once again as the naked and bare assertion of community-wide

prejudice used to bolster the State's attempt to eliminate members of defendant's race from the venire.[29]

The State trial Court's Order in this case relied on precisely the meaningless presumption of prejudice the U.S. Supreme Court has utterly and completely rejected.

> The Court finds ...* * * that if a THIRD trial of this case were to be held in Taos County, a fair trial (and a fair and impartial jury) cannot be obtained because of the existence in Taos County of each and both of the following [Section 38-3-3(A)(2)(c)]:
>
> 1. Public excitement in Taos County in regard to this case AND to the issues/questions involved herein; and or
>
> 2. Local prejudice in Taos County in regard to this case AND to the issues/questions involved herein.

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[29] ***See Supplemental Appendix A.*** Judge Blackmer had not presided over any prior *voir dire* nor had he considered the arguments and data presented to Judge Allen when the polling data before the Court was current and fresh. ***See T.R. Vol. 32 at 21; T.R. Vol. 16 at 68*** (polling done after first trial). The second trial did not even require the parties to reach the third panel to select a jury. ***T.R. Vol. 32 at 22***. The record regarding the major publicity factors was demonstrated to be remote in time and some of the major pre-trial publicity issues dissipated upon moving to Taos County. ***T.R. Vol. 32 at 22*** (noting state concurred in move to Taos); **at 23** (noting publicity regarding legislative session after accident, and changes in DWI law that were achieved thus resolved); at **24** (noting depraved mind murder uproar in 1993 and ultimate dismissal of charges in October 1994).

R.P. at 714-15. The trial Court's Order failed to include any specific findings of prejudice etc., and, failed to even *propose* any *voir dire* of any potential jurors to inquire whether the "excitement" and "local prejudice" could be disavowed. To conclude on review (as the N.M. Supreme Court did) that this venue transfer that deprived defendant of any real possibility of members of his race on the petit jury was permissible simply because "other evidence" than *voir dire* evidence may establish community-wide prejudice under the state statute, is insufficient unless the other evidence demonstrates that the irrevocable taint means a fair trial could not be had. After two trials before juries that both sides agreed were acceptable, there was utterly insufficient evidence in 1995 that the third trial required a venue transfer and especially over a defendant's objection.

ISSUE 3: The Discriminatory Use of the Facially Neutral New Mexico Venue Transfer Statute is a Structural Error and Petitioner Need Not Show Specific Prejudice in his Dona Ana

Trial to Obtain Reversal of the Venue Transfer from Taos County.

Mr. House asserted on direct appeal to the New Mexico Court of Appeals that the venue transfer to Dona Ana County had resulted in specific prejudice because he was dislodged from a presumptively correct venue on pretextual grounds, and tried and convicted in a venue that was subject to disqualifying exceptions and was thus an unconstitutionally selected venue.

But the New Mexico Supreme Court and lower federal court imposed a requirement that House demonstrate specific prejudice in the trial in Dona Ana rather than in the process by which Dona Ana was chosen as the trial venue. The misuse of a facially neutral state venue transfer statute to achieve discriminatory purposes breached both the equal protection and due process components of the Fourteenth Amendment and constituted a "structural error" for which no specific prejudice need be demonstrated and that is not subject to harmless error analysis under ***Arizona v. Fulminante***,

499 U.S. 279 (1991). ***Accord United States v. Dominguez Benitez,*** 542 U.S. 74 (2004) (noting that structural errors can entitle a defendant to relief "without regard to [their] effect on the proceeding[s]"); ***see also U.S. v. Gonzalez-Huerta*** 403 F.3d 727, 753 (10th Cir. 2005)(dissent discussing structural error)

On this issue the N.M. Supreme Court made three particularly relevant statements--first, that "There is no constitutional basis for House to demand a trial in Taos County", ***State v. House*** 127 N.M. at 165, 978 P.2d at 981 (1999), and second, for reversible error, Mr. House must prove "that he received an unfair trial in Dona Ana County," and third, "House's claims of prejudice may raise disturbing questions, these claims are inconsequential" absent specific and isolatable prejudice in the Dona Ana trial. ***Id.*** 127 N.M. at 176, 978 P.2d at 992. The Court then concluded House failed to establish prejudice from the trial in Dona Ana. ***Id.*** The Magistrate's Proposed Disposition essentially agreed. ***Proposed Disposition at pg. 21.*** As is

demonstrated below, both Courts' holdings are contrary to well settled federal law and constitute an objectively unreasonable evaluation of the facts of record.

Both Courts appear to believe his objection to Dona Ana was based on a constitutional right to be tried in Taos County by a jury selected from a venire with a certain percentage of Indians in it. ***State v. House*** 127 N.M. at 174, 978 P.2d at 990 (1999)("He suggests he had an actual right to keep the third in Taos.") While it is true that House was tried in a venue other than the one where the crime occurred, his claim is that the federal Constitution prevents the State from dislodging him from Taos county by purposeful and discriminatory action--his claim does not depend on nor content that Taos county is the constitutional vicinage. ***See e.g. Powers v. Ohio,*** 499 U.S. at 409 (juror has no right to sit on jury, but has the "right not to excluded on account of race.") Mr. House claims he had a right to be free from the unconstitutional venue shopping by the

State and the New Mexico Supreme Court agreed when it concluded that choosing a venue to eliminate members of defendant's race from the venire violated federal and state equal protection guarantees. ***House***, 127 N.M. 151, 177, 978 P.2d 967, 993 (1999).

Petitioner is entitled--wherever his trial is scheduled, and without regard to whether it is in the first, second or third venue--to be free from discriminatory misuse of facially neutral statutes to eliminate members of his race from the venire, and to achieve a venue that polling data demonstrated was more hostile to him than the one from which the trial was to be moved. ***Washington v. Davis,*** 426 U.S. 229, 241 (1976)(rejecting implementations of neutral statutes to achieve discriminatory purposes) Clear and convincing evidence established that the transfer was based on a pretextual and impermissible presumption of irrevocable bias attributed to all potential jurors in Taos County.

A. Clearly Established Federal Law Bars Harmless Error Analysis when Purposeful State Action Results in Deprivations of Due Process and Equal Protection Rights Secured by the Fourteenth Amendment.

It has been demonstrated above that the Fourteenth Amendment applies "throughout the proceedings bringing" a defendant to trial, including venue transfers and that deprivations of rights secured by the Fourteenth Amendment (due process and equal protection) in venue related matters can constitute structural errors for which reversal of a conviction is required, although specific prejudice need not be shown. ***See, Holland v. Illinois,*** 493 U.S. 474, 480 (1990)(racial discrimination applies to both venue and jury selection); ***see also e.g., Batson v. Kentucky***, 476 U.S. 79, 88 (1986) (racial discrimination in the selection of a petit jury); ***Vasquez v. Hillery***, 474 U.S. 254, 261-262 (1986) (racial discrimination in the selection of a grand jury); ***United States v. Batchelder***, 442 U.S. 114, 125, and n. 9 (1979)(racial discrimination in the exercise of prosecutorial discretion); ***Waller v.***

Georgia, 467 U.S. 39, 49-50, and n. 9 (1984) (right to a public trial); ***Tumey v. Ohio***, 273 U.S. 510, 535 (1927) (trial before an impartial judge); ***see also U.S. v. Gonzalez-Huerta***, 403 F.3d 727, 734 (10th Cir. 2005)(citing cases involving structural errors in Fourteenth Amendment cases)(discussing ***United States v. Olano,*** 507 U.S. 725, 731, (1993))

The process here employed by the State sought to obtain a venue that would effectively eliminate Indian jurors from the venire, and to move to a venue where the only record evidence indicated a greater taint by pretrial publicity than in Taos county. This behavior is utterly inconsistent with well settled federal law. To comport with federal law the state must provide-and appear to provide--a fair trial process, including nondiscriminatory applications of venue transfer statutes. ***See Berger v. United States***, 295 U.S. 78, 88 (1935)(prosecutor's actions must "comport with a higher calling" that is "not to win, but to ensure that justice shall be done."); ***Rose v. Clark***, 478 U.S. 570,

587 (1986)(STEVENS, J. concurring in judgment)("[V]iolations of certain constitutional rights are not, and should not be, subject to harmless error analysis, because those rights protect important values that are unrelated to the truth-seeking function of the trial").

The Evidence of Discriminatory Application of the Neutral Venue Transfer Statute

Each of the reviewing courts failed to evaluate the structural error claim in light of the record evidence that the venue transfer statute was used offensively to obtain a venue more disposed to convict and to eliminate members of defendant's race. ***Magistrate's Proposed Disposition at. pg. 19.***

The record conclusively established that the State was well aware that potential jurors in Dona Ana County that had heard about the case were more likely to have pre-formed opinions of guilt than those in Taos County.

Mr. Twohig: And of those who are aware, more think Gordon House is guilty than in Taos County. We've already covered that, haven't we?

Expert: Yes. That would be a true statement. I'm not sure of its significance. It's a true statement.

See* TR Vol. 16 at 75-77**. When asked how Dona Ana's population could have determined its guilty opinions in light of its alleged freedom from the distorting pretrial publicity that the State claimed saturated Taos County, the expert said "we don't know what the reason would be." ***TR Vol. 16 at 77. In other words, it was objectively unreasonable on this evidence to believe that moving the case to Dona Ana county would diminish whatever taint may be flowing from the media.

The State's poll was taken after the first trial and before the second in August 1994. At the time of the poll, the press coverage was tainting the possible venirepersons in Dona Ana at a greater rate, and with less media coverage, than in Taos. ***See Petitioner's Supplemental Appendix A*** (review of expert report and testimony).

The state's expert admitted he evaluated potential jurors and venires for a likelihood of conviction. ***See T.R. Vol. 16 at 53-54*** (expert admitting he believed that his firm could help the prosecution obtain a conviction); ***T.R. Vol. 16 at 56-57*** (expert admitting he told the media that he considered Taos County "more sensitive to Native American issues than other counties," and that the defense wanted Taos County as a venue "to try to get a fair trial"); ***T.R. Vol. 16 at 70-72*** (prosecution expert admits selected county would dramatically reduce the likelihood of Indians on the jury and no county recommended for trial location by his firm was above 1% Indian); ***T.R. 35 at 24*** (court noting that venue decision implicates venire more or less likely to convict)..

When viewed in light of the expert's understanding of his role in the trial process and the role played by a venue transfer with regard to the fair trial issue, it is objectively unreasonable on this record to conclude a race neutral, nondiscriminatory application

of the venue transfer statute occurred. This is particularly true because there was no explicit review of the State's motives by the trial court. ***Compare State v. House*** 127 N.M. at 176, 978 P.2d at 991 (1999)(noting issue that trial court failed to "earnestly question the State's motives") and ***Id.*** 127 N.M. at 179, 978 P.2d at 995 (1999)(rejecting evidence of discriminatory intent and impact) with ***Washington v. Davis,*** 426 U.S. 229, 241 (1976)(rejecting implementations of neutral statutes to achieve discriminatory purposes)

Clear and convincing evidence establishes that the expert assisted the prosecution in effecting its goal of escaping Taos County Indian jurors and selecting a venue with potential jurors more likely to convict. Based on this evidence it was also objectively unreasonable for the N.M. Supreme Court to permit the August 1994 polling data to carry sufficient weight to presume irrevocable bias on behalf of the entire Taos County venire for a July 1995 trial. ***See Murphy v.***

Florida, 421 U.S. at 802 (rejecting taint argument after only 7 months).

B. The New Mexico Supreme Court Misapplied Clearly Established Federal Law by Requiring Petitioner to Demonstrate Specific Prejudice Arising from his Trial in Dona Ana County, and Failed to Recognize the Discriminatory Use of the Race Neutral Venue Transfer Statute was the Structural Trial Process Error.

In the context of racially distorting pretrial procedures, the U.S. Supreme Court has said,

> Respondent's conviction after a fair trial, we are told, purged any taint attributable to the indictment process.

Vasquez v. Hillery, 474 U.S. 254, 261 (1986). The Court rejected this overture.

> Only six years ago, the Court explicitly addressed the question whether this unbroken line of case law should be reconsidered in favor of a harmless error standard, and determined that it should not.

Vasquez, 474 U.S. at 261-62 (citing ***Rose v. Mitchell***, 443 U.S. 545 (1979)) Discrimination based on race constituted a structural error because,

> Once having found discrimination in the selection of a grand jury, we

> simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted.

Vasquez, 474 U.S. at 264; ***Gomez v. United States,*** 490 U.S. 858, 876 (1989)(rejecting harmless error analysis when error indicates biased adjudicator)

This Court has generalized the foregoing rule,

> a defining feature of structural error is that the resulting unfairness or prejudice is necessarily unquantifiable and indeterminate, such that any inquiry into its effect on the outcome of the case would be purely speculative.

See U.S. v. Dowlin, 408 F.3d 647, 668 (10th Cir. 2005) citing ***Gonzalez-Huerta***)

As is readily apparent from the foregoing U.S. Supreme Court citations and this Court's jurisprudence, racially distorted proceedings and efforts to obtain biased factfinders are structural errors for which no specific prejudice need be shown, in large part because a reviewing court cannot know what would have happened had the process not been unconstitutionally distorted. In addition, purposeful exclusion of members of

defendant's race from the key proceedings in a criminal case, whether grand jury, petit jury or participation in the venire, "strikes at the fundamental values of our judicial system," and cannot be a harmless error. ***Vasquez***, 474 U.S. at 264; ***accord Hill v. Texas***, 316 U.S. 400, 406 (1942) ("Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty")

C. The Magistrate Misapplied the U.S. Supreme Court's Venue Transfer Cases to Erroneously Conclude that Federal Law Prohibiting Purposeful State Action to Exclude Members of Defendant's Race from the Petit Jury was Insufficiently Well Settled to Prohibit Purposeful State Action to Exclude Members of Defendant's Race from the Venire and Petit Jury through a Pretextual Use of a Venue Transfer Statute.

The Magistrate concluded that ***Estes v. Texas***, 381 U.S. 532, 542 (1965) and ***Sheppard v. Maxwell***, 384 U.S. 333, 352-353 (1966) are distinguished from Petitioner's case on the ground that the **denial** of a venue transfer that results in a constitutional deficit **is** a structural error, while the **granting** of a venue

transfer over defendant's objection that results in both due process and race-based deficits **is not** a structural error. ***Magistrate's Proposed Disposition*** *at 22-23*

The Magistrate's reliance on ***Estes, Sheppard,*** and ***Rideau v. Louisiana***, 373 U.S. 723 (1963) is misplaced. In the context of the instant case, the three cases cited by the Magistrate stand for two key propositions. First, that a failure to show "isolatable prejudice" is irrelevant when the record discloses state action that renders the trial process fundamentally unfair or discriminatory, and second, that decisions regarding venue may constitute structural and constitutional error of precisely the sort argued here by Petitioner.

The intentional state action of venue-shopping to dislodge a defendant with culturally related defenses from a venue that not only contained a significant percentage of Indians in the venire but that had twice rejected the State's case, in favor of a venue that lacked an Indian population and was demonstrably skewed

towards guilt violates well settled federal authority prohibiting discriminatory use of neutral statutes. It is a misapplication of settled federal law to conclude that denials of venue transfers may constitute structural errors while the granting of the State's venue transfer requests over a defendant's objection, may not. ***See Williams v. Taylor,*** 529 U.S. 362 (2000)(different fact patterns do not affect application of settled legal principles)

The venue cases cited by the Magistrate actually stand for the proposition that isolatable, or specific prejudice need not be shown for a reviewing court to conclude the trial process was irretrievably flawed. Clear and convincing evidence provided by the State's expert revealed a venue transfer statute that was hijacked and made to serve discriminatory ends. This constituted a trial process that was both "inherently lacking in due process" and one based on "discrimination on the basis of race." It is well settled that both of these errors are structural and

trial outcomes based thereon have been consistently rejected by the U.S. Supreme Court. ***Accord Coy v. Iowa***, 487 U.S. 1012 (1988)(denial of confrontation of witnesses, however minor, is structural error requiring reversal despite the lack of showing of specific prejudice.)

The State's offensive use of a facially neutral venue transfer statute to dislodge Petitioner from Taos County constitutes a structural error because clear and convincing evidence exists of denial of the Fourteenth Amendment rights discussed throughout this brief. ***See e.g. Miller-El***, 537 U.S. 322, 346 (2003)(quoting ***Batson***)("Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the result bespeaks discrimination.") Petitioner need not have a venire or jury with a particular percentage of Indians, but the State is not allowed to strategically foreclose that possibility by venue shopping.

ISSUE 4: The State Court Failed to Apply the Rule of Lenity to New Mexico's Ambiguous Vehicular Homicide Statute Despite a New Mexico Appellate Decision Holding the Statute was Ambiguous, and Failed to Apply the Rule of Lenity to the Inherently Ambiguous Recidivist Sentencing Provision Relied Upon by the Trial Court and in both Instances Violated Clearly Established Federal Due Process Rules

In ***State v. Landgraf,*** 1996-NMCA-24, 121 N.M. 445, *CERT DENIED,* 121 N.M. 375 (1996) the New Mexico Court of Appeals held that statutory ambiguity and double jeopardy principles required that the rule of lenity be applied to vacate one of two redundant convictions under New Mexico's vehicular homicide statute, 1978 NMSA § 66-8-101(A) and (C). Because he was redundantly convicted and sentenced on both alternative grounds (A) and (C) under this statute--as had the defendant in ***Landgraf--***Mr. House timely filed a Motion to vacate one set of convictions. The only difference between sections (A) and (C) is the DWI-related provision also

mandated a 2-year enhancement for each prior DWI conviction.

Mr. House contended the inherent ambiguity in the statute and the result in ***Landgraf*** required that the DWI-related convictions be vacated. Judge Blackmer brushed aside the defense contentions and selected the DWI-related convictions over the Reckless-Driving related convictions, and then pyramided the 2-year enhancement five times (once for each conviction) to increase the sentence from 15 to 25 years. ***State v. House,*** 130 N.M. 418, 421, 25 P.3d 257, 260 (N.M.App. 2001)

Mr. House challenged the trial court's "election" of the DWI-related convictions contending the trial court did not have unfettered discretion to choose the alternative conviction that resulted in a recidivist enhancement. He made three statutory ambiguity arguments, ***see Petitioner's First Legal Memorandum in Support of Petition for Habeas Corps***, at pg. 66 ("(1) the statute does not contain a preference for one

alternative over the other and, (2) that the recidivist provision of § 66-8-101(D) is ambiguous and constitutionally suspect, the trial Court should have strictly construed the statute to ensure no questionable sentence was imposed").[30]

The New Mexico Court of Appeals found,

> No matter the theory by which the State chooses to prosecute, the crime is a third-degree felony. By this light alone, it is unclear whether the Legislature intended that one be viewed as a greater public concern and therefore a greater offense. * * * We conclude that the Legislature viewed DWI--related violations as the graver or more serious offense. As such, the district court appropriately retained the DWI--related convictions.

State v. House, 130 N.M. 418, 423, 25 P.3d 257, 262 (N.M.App. 2001)(citations omitted)

The Magistrate's ***Proposed Disposition*** concluded,

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[30] The ***Proposed Disposition*** at fn 6 notes the N.M. Court of Appeals found the constitutional doubt challenge was waived. However, the contention that the recidivist-sentencing provision was ambiguous was not waived, but was not addressed by the ***Proposed Disposition***. ***See State v. House***, 130 N.M. 418, 422, 25 P.3d 257, 261 (N.M.App. 2001)(noting defendant's argument that statute is "irreducibly ambiguous"--and the rule of lenity mandates that the reckless-driving-related vehicular homicide convictions be retained)

> Applying the general rule of double jeopardy that when a defendant has been convicted of the same offense twice, the lesser offense should be vacated, the state appellate Court affirmed the trial Court's vacation of the reckless-driving vehicular homicide and reckless-driving great bodily injury counts.

Proposed Disposition at pg. 25.

The ***Landgraf*** Court held:

> [I]n the absence of a clear indication that the legislature intended multiple punishment for the unitary conduct, the Court should apply the rule of lenity to presume that the legislature did not intend multiple punishment.

Landgraf, 121 N.M. at 455. Similarly, clearly established Federal law requires the rule of lenity be applied to ambiguous statutes unless the claim to ambiguity is meritless, ***Caron v. United States***, 524 U.S. 308, 316 (1998), and here the double jeopardy principles that underpin the ***Landgraf*** opinion are well settled in federal law as well. ***U.S. v. Davis,*** 793 F.2d 246, 248 (10th Cir. 1986)("The double jeopardy test does not focus on the acts charged in the indictment or the evidence at trial, but rather on the

elements of the crimes.") Mr. House contends that New Mexico has already determined that the precise provisions in the statute are ambiguous and this construction is binding on federal courts sitting in review. ***Chapman v. LeMaster,*** 302 F.3d 1189 (10th Cir. 2002)

The courts in this case circumvented the ***Landgraf*** holding by claiming the principle did not apply because of the DWI-related enhancement, "the Legislature viewed DWI--related violations as the graver or more serious offense." ***State v. House,*** 130 N.M. 418, 423, 25 P.3d 257, 262 (N.M.App. 2001); ***Proposed Disposition at pg. 25.***

The Courts' conclusions that vehicular homicide by DWI is a "lesser included" offense to vehicular homicide by reckless driving is entirely illogical. ***See*** 1978 NMSA § 66-8-101. It is not possible that being convicted twice of the "same offense" can lead to a ruling that the "lesser offense" should be vacated. ***See e.g. U.S. v. Davis,*** 793 F.2d 246, 248 (10th Cir. 1986)

There is no "lesser offense" under New Mexico's Vehicular Homicide statute after ***Landgraf***, nor could there be under clearly established federal law because the only difference between the vehicular homicide by reckless driving conviction and the vehicular homicide conviction by DWI, is the misapplied and ambiguous recidivist sentencing provision that attaches to the DWI conviction but is not an element of the offense. ***See Apprendi v. New Jersey***, 530 U.S. 466 (2000) (if the existence of any fact other than a prior conviction increases the maximum punishment, that fact is an element and there is a lesser included offense). The required ambiguity was found by the New Mexico Court of Appeals in ***Landgraf,*** and under clearly established Federal law the recidivist enhancement is not an element of the underlying criminal offense. ***Apprendi v. New Jersey***, 530 U.S. 466 (2000).

A. Petitioner's Period of Incarceration was Significantly Increased by Allowing the Trial Court Unfettered Discretion to "choose" one Alternative Ground for Conviction over Another and it Chose the DWI-Related Conviction so it Could Stack the Recidivist Enhancements in Direct Conflict with Clearly Established Federal Due Process Rights Under The Rule of Lenity.

Reliance on the DWI-related convictions increased the overall punishment of Mr. House from 15 to 25 years and depended on a inherently ambiguous section of the vehicular homicide statute and was a construction of the vehicular homicide statute contrary to legislative intent. ***See*** 1978 NMSA § 66-8-101(D) (recidivist enhancements); ***see TR/Vol. 1*** at 62-66 (argument on enhancements).

At most, Mr. House's sentence could be enhanced by 2 rather than 10 years and this Court has authority to find the New Mexico Court of Appeals construction of New Mexico's vehicular homicide statute contrary to well settled federal principles. ***Frisby v. Schultz***, 487 U.S. 474, 483 (1988) ("[W]hile we ordinarily defer to lower Court constructions of state statutes we do

not invariably do so.") (Citations omitted.) ***State v. House,*** 130 N.M. 418, 425, 25 P.3d 257, 264 (N.M.App.,2001)("Defendant argues that the rule of lenity requires, in light of the claimed ambiguities, that only the general sentence upon the five counts be enhanced (resulting in a single, two-year enhancement").

It is clearly established Federal law that any construction of a state statute that authorized the trial judge to select a greater punishment through the exercise of unfettered discretion usurps the legislative prerogative to fix the penalty for the crime and impermissibly allows the trial Court to impose its own views concerning the appropriate punishment for the accident. ***See e.g. Graham v. Collins***, 506 U.S. 461, 496 (1993) ("It is manifest that the power to be lenient [also] is the power to discriminate.") (Citations omitted.) Calling the reckless driving statute a "lesser included" offense does not alter the fact that the jury did not convict

Mr. House under the recidivist sentencing provision but convicted him equally under the DWI and reckless driving alternative grounds available under the liability portion of the statute. ***Accord State v. Harris***, 101 N.M. 12, 20-21, 677 P.2d 625, 633-34 (Ct. App. 1984) ("the length of a sentence is a legislative prerogative, and . . . absent a compelling reason, the judiciary shall not impose its own views concerning the appropriate punishment for crimes"). The State trial court impermissibly retained the DWI-related offense in order to pyramid the enhancement to increase the penalty instead of applying the rule of lenity.

B. The Recidivist Enhancement Provision is Internally Inconsistent and Ambiguous and Clearly Established Federal Law Required the State Trial Court to Effect a Construction that Avoided Reliance on the Ambiguity to Eliminate any Doubt as to the Sentence.

The challenged sentencing provision, NMSA § 66-8-101(D) is ambiguous and, as applied in this case, was contrary to well settled federal law.

> Any person who commits homicide by vehicle or great bodily injury by vehicle while

> under the influence of intoxicating liquor or while under the influence of any drug, ... who has incurred a prior DWI conviction within ten years **of the occurrence** for which he is being sentenced ..., shall have his basic sentence increased by two years **for each prior DWI conviction**. (emphasis added)

NMSA § 66-8-101(D) Petitioner argued that the recidivist provision is, at a minimum, ambiguous and subject to misapplication because by its plain terms it enhances the punishment based on "each prior" act of DWI misdemeanor misconduct, and only for "the occurrence for which he is being sentenced" rather than the number of convictions or offenses arising out of the "occurrence."

Yet the trial Court, the New Mexico Court of Appeals and the Magistrate all concluded that despite the identified ambiguities, it was permissible to impose one 2-year enhancement and then stack the enhancement four more times, once for each "conviction" under the statute rather than the sentence arising out

of the singular occurrence. ***RP/2033-34*** (amended judgment)

The Court of Appeals construction of the statute not only violated New Mexico's rule that state criminal statutes be strictly construed against the state, ***State v. Anaya***, 123 N.M. 14, 1997-NMSC-10, but contravened well settled Federal law requiring lenity when applying ambiguous criminal statutes. ***See e.g., Beecham v. United States***, 511 U.S. 368, 374 (1994); ***Smith v. United States***, 508 U.S. 223, 239-241 (1993); ***Bell v. United States***, 349 U.S. 81, 83-84 (1955). These authorities demonstrate that the pyramiding of the enhancements violated the well established Federal rule of lenity notwithstanding the New Mexico Court's conclusion that the legislature intended to impose heavier penalties on the recidivist. The fact that a heavier penalty may be contemplated does not authorize repeated stacking of the penalty, it authorizes its imposition once. The legislature calibrated the penalty to the single prior act of misconduct rather

than the particular outcome in the instant case. Petitioner's sentence should be reduced by eight years.

ISSUE 5: Disqualification of the State Trial Judge and the Erroneous Determination of Waiver

The Magistrate's Proposed Disposition found:

> The New Mexico Court of Appeals' ruling that the issue had been inadequately briefed and therefore waived is a factual finding - the Petitioner's Brief in Chief did not contain specific arguments, did not contain a statement of the facts, and omitted the background of the motion. A determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This Court has reviewed the ***Brief in Chief*** (Exhibit B to Exhibit X, Answer) and the Petitioner's arguments and cases cited in support thereof. This Court does not find that the Petitioner has rebutted the presumption of correctness by clear and convincing evidence."

P**roposed Disposition at pg. 24.**

It is well settled that where there was no actual violation of the state procedural rule cited by the

Court, there is no default. ***See Trevino v. Texas***, 503 U.S. 562, 566-67 (1992) (per curiam) citing ***Ford v. Georgia***, 498 U.S. 411 (1991). In both ***Trevino*** and ***Ford*** the Court rejected application of state rules to achieve bars to federal review. Like the instant case, the state Courts in ***Ford*** and ***Trevino*** had determined the issue was inadequately presented.

As is detailed in the record before this Court, the challenge to Judge Blackmer was presented on the merits first to Judge Blackmer, then to the Chief Criminal District Judge Frank Allen, to the Chief District Court Judge for the Second Judicial District John Brennan, and to the New Mexico State Supreme Court by extraordinary Writ. ***Petitioner's First Memorandum of Law***, at pgs. 72-76; ***see also*** Exhibit X to State's Answer to the Petition (Petitioner's ***Brief in Chief***, pgs. 30-35); Exhibit V ***(Reply Brief)***; ***see R.P.*** at 1796-2026 (writ materials). Judge Blackmer rejected the request that he step aside, and Petitioner was never able to obtain an evidentiary hearing. ***See R.P. at***

01785 (Court order noting no judge was available to hear the motion to disqualify). The inability to obtain an evidentiary hearing before a judge whose conduct was not itself at issue, was contrary to well settled federal principles. The subsequent sentencing errors that increased Petitioner's sentence by at least eight years is sufficient prejudice to show Judge Blackmer's bias against Mr. Twohig that bled over to Mr. House.

Even assuming the State Court's determination that Petitioner's ***Brief in Chief***, and ***Reply Brief*** and the manifest citation to each fact underpinning his Motion to Disqualify Judge Blackmer was inadequate under the State's procedural rules, which Petitioner demonstrated by clear and convincing evidence it was not, this Court should not countenance non-review of a question of fundamental fairness as crucial to our system of justice as a unbiased trial judge.

The claim was raised below, again on direct appeal, by filing of an extraordinary writ with significant

evidentiary attachments and again in his Petition to this Court, and his ***First Legal Memorandum*** and his ***First Reply Memorandum*** in the U.S. District Court. Procedural rules are designed to get the Petitioner's contentions to the right tribunal at the right time and nothing in the record suggests this was not done. The lower federal court obtained "all records associated with the underlying state case CR 93-1693 and all its appeals." *Id.* On January 9, 2004 the Court received portions of the record proper and the transcripts. The entire matter involving Judge Blackmer's disqualification appears in the Record Proper and was discussed in Petitioner's ***Brief in Chief*** before the New Mexico Court of Appeals at pgs. 30-35 and in his ***Reply Brief*** in the Court of Appeals at pgs. 11-14 (citing the specific factual basis for the Motion at fn. 4). ***See* generally R.P. 1796-2026** (entire Supreme Court writ materials).

The Court of Appeals conclusion is an objectively unreasonable application of a state procedural rule and

violated well settled federal law. Judge Blackmer should have been disqualified or at a minimum an evidentiary hearing should be allowed.

A. Clearly Established Federal Due Process Principles Required that Judge Blackmer be Disqualified.

Pursuant to the requirements of the U.S. Constitution, the judicial system "endeavor[s] to prevent even the probability of unfairness," ***Withrow v. Larkin***, 421 U.S. 35, 47 (1975), and unconstitutional judicial bias exists when "the risk of unfairness is intolerably high" under the circumstances of the particular case, *Id.* at 58; *cf.* N.M. CODE JUD. CONDUCT 21-400(A) ("A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."). Both federal and state law recognize that such an unconstitutional risk of unfairness may occur because of bias towards a party's lawyer. ***See, e.g., United States v. Elder***, 309 F.3d 519, 525-26 & n.9 (9th Cir. 2002); ***Bell v. Chandler***, 569 F.2d 556, 560 (10th Cir.

1978); ***State v. Case***, 676 P.2d 241, 243-44 (N.M. 1984); N.M. CODE JUD. CONDUCT 21-400(A)(1).

Petitioner was entitled to judicial disqualification under the U.S. Constitution because of Judge Blackmer's well-documented bias towards Mr. House's trial counsel, Ray Twohig. This factual showing, had it been fairly considered at any level in the New Mexico judicial system, established that the risk of unfairness to Petitioner was intolerably high.

Fero v. Kerby, 39 F.3d 1462, 1479 (10th Cir. 1994) (quoting ***Withrow***, 421 U.S. at 47). In the instant case, the ongoing conflicts between Mr. Twohig and Judge Blackmer unfortunately made Judge Blackmer the target of strong criticisms from the attorney before him, criticisms that affected Judge Blackmer's judgment in sentencing Petitioner. ***See also Taylor v. Hayes***, 418 U.S. 488, 501-03 (1974); *cf.* ***Mayberry v. Pennsylvania***, *400 U.S. 455 (1971);* ***Cf. Pickering v. Board of Education***, 391 U.S. 563, 578-79 & n.2 (1968) (stating the because the original factfinder was embroiled in

the controversy and the state courts had given deference to those findings, the Court would examine the evidence independently).

That petitioner was constitutionally entitled to judicial disqualification is inescapably obvious when measured against federal and state cases posing similar circumstances. ***See, e.g., United States v. Avilez-Reyes***, 160 F.3d 258 (5th Cir. 1998) (holding that judge should have recused himself when defense counsel had one month earlier testified against judge in judicial disciplinary proceedings); ***State v. Salazar***, 898 P.2d 982, 982-87 (Ariz. Ct. App. 1995) (holding that judge should have been disqualified where defense counsel represented judge's former employee in a suit against judge); ***Livingston v. State***, 441 So. 2d 1083 (Fla. 1983) (holding that previous disputes with defense counsel required judge's disqualification); ***Schlenz v. Castle***, 477 N.E.2d 697, 714 (Ill. App. Ct. 1985) (holding that judge was properly removed where judge and plaintiff's attorney were opponents in another

case); ***State v. Hahn***, 660 N.E.2d 606 (Ind. Ct. App. 1996) (holding that judge should have been removed when prosecuting attorneys had previously prosecuted judge); ***Hulme v. Woleslagel***, 493 P.2d 541, 543-51 (Kan. 1972) (holding that previous disputes with law firm required judge's disqualification); ***Auto Workers Flint Fed. Credit Union v. Kogler***, 188 N.W.2d 184 (Mich. Ct. App. 1971) (holding that judge should be disqualified from hearing all cases involving law firm because of judge's past conduct toward members of firm and member of firm had filed a grievance against judge).

B. The New Mexico Courts Violated Minimal Due Process by Giving the Challenged Judge Unfettered Discretion to Reject a Legally Sufficient *Prima Facie* Entitlement to Judicial Disqualification Without a Hearing of Any Sort.

Judge Blackmer - the allegedly biased judge - remains the only judge to have considered the motion to disqualify on the merits. The presiding criminal judge and chief judge refused to provide any check on Judge Blackmer's discretion or review of his decision not to hold an evidentiary hearing or recuse himself.

Petitioner sought an extraordinary writ, which the New Mexico Supreme Court denied without opinion. Petitioner sought appellate review and was erroneously found to have procedurally defaulted his claim.

Because unconstitutional judicial bias violates defendants' fundamental constitutional rights, due process requires that the state observe procedures to protect the right to a fair tribunal. ***Ward v. Monroeville***, 409 U.S. 57, 61-62 (1972) (requiring "procedural safeguards" that ensure "a neutral and detached judge in the first instance"); ***see also Riggins v. Nevada***, 504 U.S. 127, 137-38 (1992). The New Mexico Court of Appeals' refusal to review the District Court's failure to provide any process beyond the challenged judge's summary denial, if left undisturbed, violates minimal due process by failing to give any meaningful protection to Petitioner's fundamental constitutional right to an impartial judge.

The New Mexico courts violated minimal due process requirements by not providing appropriate procedural

safeguards to protect Petitioner's right to an impartial judge. ***Ward***, 409 U.S. at 61-62. The U.S. Supreme Court has stated that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." ***In re Murchison***, 349 U.S. 133, 136 (1955). The procedure that allowed Judge Blackmer to reject a legally sufficient *prima facie* entitlement to disqualification, subject only to abuse-of-discretion review, provided such a temptation.

The state procedures fell far short of those required by the federal statute, 28 U.S.C. § 144, which is "declaratory of constitutional requirements" regarding recusal for demonstrated bias. ***Walberg v. Israel***, 766 F.2d 1071, 1076-77 (7th Cir. 1985) (involving bias towards a party's attorney). Federal district judges must "proceed no further" upon submission of legally sufficient allegations of bias or prejudice. 28 U.S.C. § 144. Challenged federal

district judges may rule on the legal sufficiency of the motion, but all factual allegations must be taken as true. ***United States v. Bray***, 546 F.2d 851, 857 (10th Cir. 1976). The federal circuit courts of appeals review district judges' rulings as to legally sufficiency *de novo*.[31] ***See, e.g., Hoffman v. Caterpillar, Inc.***, 368 F.3d 709, 717 (7th Cir. 2004); ***Souder v. Owens-Corning Fiberglas Corp.***, 939 F.2d 647, 653 (8th Cir. 1991).

Comparison with other jurisdictions underscores the insufficiency of New Mexico's procedures in this case. The most common practice appears to be to allow a litigant to disqualify a judge by filing a "conclusory affidavit." John Leubsdorf, *Theories of Judging and*

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[31] The 10th Circuit has stated that it reviews motions to disqualify under 28 U.S.C. § 144 and § 455 for abuse of discretion. ***See Varela v. Jones***, 746 F.2d 1413, 1416 (1984). That rule, however, assumes mixed questions of law and fact are presented on appeal. As to the narrow question of the legal sufficiency of the pleading, a pure question of law, abuse of discretion and *de novo* review are coextensive. *See* ***Winnebago Tribe v. Stovall***, 341 F.3d 1202, 1205 (10th Cir. 2003) (stating that abuse of discretion occurs where "the district court commit[s] an error of law"); *cf.* ***Schenck v. City of Hudson***, 114 F.3d 590, 593 (6th Cir. 1997) ("A district court abuses its discretion when it applies the incorrect legal standard [or] misapplies the correct legal standard . . . .").

Judge Disqualification, 62 N.Y.U.L. REV. 237, 240 n.13 (1987) (listing 17 states with such a rule). A number of other jurisdictions require that a judge other than the challenged judge review motions to disqualify. *See, e.g.*, TEX. GOV'T CODE § 74.059; UTAH R. CR. P. 29(2); ***State v. Fleming***, 267 S.E. 2d 207, 209 (Ga. 1980) (requiring a second judge to hear a legally sufficient motion to recuse).

New Mexico, in contrast, follows what the secondary literature calls a "bizarre rule [which] calls on the very judge whose acts are alleged to be warped by . . . bias to decide whether there is an adequate showing of bias." ***Leubsdorf***, *supra*, at 242. The challenged judge is not required to step aside or refer the matter to another judge upon submission of a legally sufficient motion, but may hear evidence and resolve factual disputes before issuing a final decision. ***Cherryhomes***, 840 P.2d at 1266. This final decision is reviewed on appeal for abuse of discretion. *Id.*

The failure of the State of New Mexico to provide an impartial assessment of Judge Blackmer's bias, either before sentencing, or on appeal, constituted a ruling that is contrary to well settled federal law and must be vacated.

CONCLUSION

For the foregoing reasons, Mr. House's Application for Writ of Habeas Corpus should be granted.

ORAL ARGUMENT REQUEST

Oral argument is requested for several reasons including, the first impression nature of the issues presented, the key constitutional underpinnings of the arguments, the significance of the issues to Indian citizens of the Western United States and the impact the ruling will have on pending criminal cases in the Tenth Circuit.

In addition, the record encompasses three separate three-week trials, and three full appellate decisions by the lower state courts and two extraordinary writs to the New Mexico Supreme Court.

Oral argument will provide the court an opportunity to question counsel for both Petitioner and State that have been involved in the cases for nearly ten years. It will provide counsel with an opportunity to go beyond the written submissions and provide a panel of this court with an opportunity to ask clarifying questions about the record and explore with counsel any concerns regarding the breadth and application of its

ruling in future cases, and the appropriate reach of any remedy the Court may wish to grant.

Respectfully submitted,

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Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I, William J. Friedman, certify that this brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) and this Court's Order of December 5, 2005 authorizing 17,000 words or less because:

1. This brief contains **16,972** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GORDON HOUSE,	)	
	)	
Petitioner/Appellant,	)	
	)	
v.	)	**Case No. 05-2129**
	)	
ERASMO BRAVO, Warden, Santa Rosa County Correctional Facility, et al.,	)	
	)	
Respondents/Appellees	)	
	)	

On Appeal from the United States District Court of New Mexico,
Judge Martha Vasquez, presiding
No. 02-0178

CERTIFICATE OF SERVICE and IDENTITY BETWEEN ELECTRONIC SUBMISSION AND PAPER SUBMISSION

I hereby certify that on this 28th day of December, 2005, I caused to be electronically filed an original electronic copy of the Petitioner's First Brief In Chief In Support Of His Application For A Writ of Habeas Corpus Pursuant to 28 USCA § 2254 that is identical to the paper versions of the brief mailed to the Clerk and to opposing counsel listed below:

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