**ORAL ARGUMENT REQUESTED**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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| **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 REPLY BRIEF IN SUPPORT OF HIS APPLICATION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 USCA § 2254

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## REPLY ARGUMENT

**ISSUE 1: The Fourteenth Amendment's Equal Protection Principles Apply to Venue Transfer Decisions Taken Under State Law**

Petitioner argued that The Fourteenth Amendment's protections apply to all proceedings by which the jury is selected, including venue selection. The State set up a stalking horse claiming the question beyond judicial scrutiny on habeas because "***Batson*** stands for no such proposition and no decision of the Supreme Court's has ever so much as hinted that it does." ***Reply Brief*** at 16. The U.S. District Court held "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).

The State's Answer, like the lower federal court decision, conflates two distinct issues: the application of the Fourteenth Amendment to venue transfers and the proper application of ***Batson's*** three-step burden shifting approach.

The U.S. Supreme Court has long recognized the selection of a jury in a criminal case has several key components. ***Batson v. Kentucky,*** 476 U.S. at 89 (Court referring to the selection of the petit jury as "the component of the jury selection process at issue here.") It is well settled that the Fourteenth Amendment applies to each of these components, "the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice" ***Batson,*** 476 U.S. at 88-89 (1986)(citing ***Hill v. Texas,*** 316 U.S. 400, 406 (1942))

Similarly, the Fourteenth Amendment venire cases apply to *petit jury* selection cases because, "there can be no dispute" that peremptory challenges constitute "a jury selection practice" that provides opportunities for discrimination just as much as the venire selection proceedings. ***Batson,*** 476 U.S. at 96; ***Id.*** at 88 ("the principles announced there [venire cases] also forbid discrimination on account of race in selection of the petit jury.") Moreover, the Fourteenth Amendment has

been relied upon, in its due process rather than its equal protection cloak, when the question was the propriety of the denial of a venue transfer. ***Rideau v. Louisiana***, 373 U.S. 723, 726 (963)(failure to transfer venue provides substandard due process); ***but see Murphy v. Florida***, 421 U.S. 794 (1975)(defendant was not denied due process when the trial court denied his motion for a change of venue.)

The New Mexico Supreme Court agreed with the U.S. Supreme Court cases cited above by concluding-

> 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; ***Id.*** 178 ("we base our *Batson*-venue analysis upon federal equal protection principles."); ***see also Williams v. Taylor***, 529 U.S. 362 (2000)("clearly established Federal law" includes situations where "the State court correctly identifies the *governing principles* from Supreme Court precedent….."); ***Wright v. West***, 505 U.S. 277, 304 (1992)

(well established law controls when "the factual differences do not change the force with which the precedent's underlying principle applies.")

The State's argument that ***Batson*** was not a venue transfer case so the Fourteenth Amendment's protections in the venue transfer setting are not well settled, is meritless and objectively unreasonable. The Fourteenth Amendment applies to each of the components of the prosecutorial machinery by which the jury is selected.

**A. The Application of the Fourteenth Amendment to Venue Transfers is Required by Applicable U.S. Supreme Court Cases and is Consistent with its Purposes.**

Justice Scalia has said generally of the Fourteenth Amendment in this setting, the "object of the principle and the reach of its logic" prohibits "unequal treatment in general and racial discrimination in particular" and has long applied both to "the petit jury and the venire stages."[1] ***Holland v. Illinois*** 493

[1] Consistent with this principle, courts have recognized that a prosecutor's purposeful discrimination in excluding even a single juror on account of race cannot be tolerated. ***Holloway v. Horn*** 355

*(footnote continued to next page)*

U.S. 474, 479 (1990). The protections extend equally to the jurors excluded and the defendant whose trial reliability suffers for it. ***Id.*** 493 U.S. at 488 (Kennedy, J., concurring)("exclusion of a juror on the basis of race, whether or not by use of a peremptory challenge, is a violation of the juror's constitutional rights."); ***Batson,*** 476 U.S. at 86 ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection.")

**B. The Application of the Fourteenth Amendment to Venue Transfers is Required Because Venue Transfers are Part of the Jury Selection Process and may be used to Exclude Jurors Based on Race.**

The Supreme Court has rejected the precise practice followed here by the State--use of a facially neutral

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*(footnote continued from previous page)*
F.3d 707, 720 (3rd Cir. 2004); ***Harrison v. Ryan,*** 909 F.2d 84, 88 (3d Cir.1990) (holding that relief must be granted under ***Batson*** "when even one black person is excluded for racially motivated reasons"); ***see also United States v. Vasquez-Lopez,*** 22 F.3d 900, 902 (9th Cir.1994) (recognizing that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose"); ***United States v. Battle,*** 836 F.2d 1084, 1086 (8th Cir.1987) ("[W]e emphasize that under *Batson,* the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.").

state statute "to exclude persons from the venire on racial grounds." ***Batson,*** 476 U.S. at 88; ***see 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 trial were well aware that Taos County has a 6.5% Native American adult population while Doña Ana County has only about 0.8%.")

Facially neutral statutes that impact the venire must be implemented neutrally to ensure "that in the process of selecting the *petit jury* the prosecution and defense will compete on an equal basis." ***Holland v. Illinois***, 493 U.S. 474, 481 (1990) In fact, the Fourteenth Amendment ensures that racially neutral procedures be used at all "stages in the selection process," ***Avery v. Georgia,*** 345 U.S. 559, 562 (1953)

The Court has noted that it must "look beyond the face of the statute defining juror qualifications and also consider challenged selection practices" to ensure the State does not indirectly achieve what which has been directly denied. ***Batson,*** 476 U.S. at 88. Here

the state's venue transfer statute was used to achieve the elimination of the defendants' race from the venire and its application in this case must be reviewed under the Fourteenth Amendment because of its significant and controlling impact on the ultimate make-up of the petit jury.

### C. *Batson* Established an Evidentiary Burden Shifting Framework to Ensure Jurors Would not be Excluded Based on Race and Its Application to Venue Transfers is Preferred Under the Fourteenth Amendment.

***Batson*** was not only a case about applying the anti-discrimination principles of the Court's venire cases to the selection of the *petit jury*, but it addressed the "crippling burden of proof" imposed by ***Swain*** and "reject[ed] this evidentiary formulation as inconsistent with standards...for assessing a *prima facie* case under the Equal Protection Clause." ***Batson,*** 476 U.S. at 92-93 Under ***Batson's*** careful three-step evidence ordering and burden shifting process, the key determination is made at step three by the trial judge because "a finding of intentional discrimination is a

finding of fact" and appropriate deference is due because "the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility." ***Id.*** As is addressed more thoroughly under Issue II, no such evaluation was explicitly made by the trial judge because he largely ignored the Petitioner's claim that the prosecution was seeking to eliminate Indian jurors. ***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)

**D. *Miller-El v. Cockrell* is Applicable to this Case.**

The State continues to argue that ***Miller El v. Cockrell,*** 537 U.S. 322 (2003)is irrelevant authority that may not be considered because it was decided after the State court opinion challenged herein. ***Answer Brief at*** 16. This argument is meritless. ***Miller-El*** established no new law but instead clarified the type

and quantum of record evidence required to demonstrate a ***Batson*** violation.

> ***Miller-El,*** however, did not announce a new constitutional right to be applied retroactively, but merely applied the long-established law of ***Batson v. Kentucky*** (citations omitted) that discrimination by a prosecutor in selecting a defendant's jury violated the Fourteenth Amendment.

***Jordan v. Dretke*** 2005 WL 2124153, 1 (N.D.Tex. 2005); ***see also Murphy v. Dretke*** 416 F.3d 427, 439 (5th Cir. 2005); ***see Miller-El v. Dretke,*** --- U.S. ----, 125 S.Ct. 2317 (2005) (granting federal habeas relief where state court's factual findings as to nonpretextual nature of state's race-neutral explanations were shown to be wrong by clear and convincing evidence)

**ISSUE 2: Clearly Established Federal Law Prohibits Deference to a Trial Judge's Presumption that an Entire Venire is Irrevocably Tainted by Pretrial Publicity When the Trial Judge Never Even Visited the Venue and Never Undertook any Voir Dire, and Failed to Undertake Even a Rudimentary *Batson*-like Review of The Evidence Arising From The First Two Trials.**

No U.S. Supreme Court case has held an entire community may be presumed unfit for jury duty in the

absence of first hand evaluation of the veniremen. No Tenth Circuit case has been cited that affirms a presumption of irrevocable community wide prejudice in circumstances like those present in this case. In a very recent case this Court said, "the Supreme Court has not found a single case of presumed prejudice in this country since the watershed case of ***Sheppard***" in 1966." ***Goss v. Nelson***, 2006 WL 392070, *7 (10th Cir.2006). Presumed prejudice is "rarely invoked and only in extreme circumstances." ***Id.***(quoting ***Stafford v. Saffle***, 34 F.3d 1557, 1567 (10th Cir.1994))

Despite the rarity of such cases, the State and lower federal courts brushed off the searching inquiry that the state trial judge's presumption of prejudice after two hung juries should have triggered. ***U.S. v. Wittig*** 2005 WL 758605, *9 (D.Kan. 2005)("The fact that the first trial ended in a mistrial is indicative of a fair and impartial jury, not one predisposed to defendants' guilt."); ***Henyard v. Crosby*** 2005 WL 1862694, *3 (M.D.Fla.) (M.D.Fla.,2005)("Ordinarily,

absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury." quoting ***Manning v. State,*** 378 So.2d 274 (Fla.1980))

Federal law recognizes two grounds upon which venue transfers may be undertaken to abate pretrial publicity, when there is actual prejudice disclosed by *voir dire* or when "when the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community." ***Goss v. Nelson*** 2006 WL 392070, *4 (10th Cir.2006) Presumptions of community wide prejudice are permissible in the Tenth Circuit only when publicity "created either a circus atmosphere in the court room or a lynch mob mentality such that it would be impossible to receive a fair trial." ***Id. at*** *5 citing ***Hale v. Gibson,*** 227 F.3d 1298, 1332 (10th Cir.1994) (no pretrial prejudice because the bulk of the press coverage occurred seven months prior to trial). ***See also Goss,*** at *7 citing ***United States v. McVeigh,*** 153

F.3d 1166 (10th Cir.1998). Notably absent from federal jurisprudence is any statement that hung juries may be used as a foundation for disqualifying an entire community. ***See, e.g.*** 2005 WL 758605 ***Wittig***, at *9 (noting hung juries are proof of unbiased juries).

**A. Utilizing a Record Review Like that Undertaken in *Goss* v. *Nelson* Demonstrates that the Conclusion of Irrevocable Community Wide Prejudice is Manifestly Erroneous.**

"Nothing about the press coverage here suggests the corruptive and pervasive media blitz the Supreme Court has required to presume prejudice. " ***Goss*** at *9 The ***Goss*** court examined several factors, including the timing of the publicity, the distribution of the publicity, the infrequency of the coverage and the factual nature of most of the articles. Examining the record in this case using similar factors inescapably demonstrates that the same result should be reached here. ***See Petitioner's Supplemental Appendix A (review of record evidence).***

The New Mexico Supreme Court characterized the record on the publicity situation as it stood in Dec. 1994--

> 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 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.[2]

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

Two months later in February 1995, the State failed to present any new evidence in support of its third request to escape Taos County jurors and Judge Blackmer relied on a transcript of the testimony of the state's polling expert from the August 1994 hearing, six months before. ***See T.R. Vol. 32 at 21; T.R. Vol. 32 at pgs. 23-28*** Based on nothing but the stale evidence that had been rejected by both trial judges that had conducted the first two trials and juror voir dires and was later rejected by the Supreme Court in the gag order review, Judge Blackmer granted the State's motion.[3]

One month later, in a March 1995 hearing to pick a trial venue, 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.[4] ***See Petitioner's Supplemental***

[3] ***State v. House***, 127 N.M. at 164, 978 P.2d at 980 (1999).
[4] ***State v. House*** 124 N.M. at 571, 953 P.2d at 744.

***Appendix A, pgs. 10-15*** (review of pollster's testimony).

Despite the polling results that demonstrated bias against the defendant in Dona Ana County,[5] and the diminution of Native Americans to less than 1%, and less bias against the State in Taos County than existed against Defendant, Judge Blackmer chose Dona Ana County and added that his selection was in part made to benefit defendant as well as the prosecution.[6] Defendant again strenuously objected and filed a petition for Writ of Superintending Control to the New Mexico Supreme Court that was denied. ***State v. House***, 127 NM at 159, 978 P.2d at 975.

Judges Allen and Blackhurst--who conducted the first and second trials respectively, and who rejected the State's evidence of bias presented in the first two motions for transfer--and the New Mexico Court of Appeals, all concluded that the State's scanty evidence

[5] ***State v. House*** , 124 N.M. at 572, 953 P.2d at 745.
[6] ***State v. House,*** 127 N.M. at 179, 978 P.2d at 995 (1999)

in this case was an objectively unreasonable factual foundation for a venue transfer.[7]

> 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).

[7] ***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).

**B. The Determination that the Entire Taos County Population was Irrevocably Biased is Unsupported by the Record, and in the Absence of Any First Hand Exposure to the Venue, the Veniremen or the Community, the Trial Judge's Conclusions Should Receive No Deference.**

The ***Goss*** court touched on the key reason that factual determinations regarding potential juror partiality are accorded deference--noting it is the trial judge "in the locale where the publicity is said to have had its effect" who can gauge "the depth and extent of news stories that might influence a juror." ***Goss,*** at *10 quoting ***Mu'Min v. Virginia***, 500 U.S. 415, 427 (1991). Our cases defer to the trial judge because of its "own evaluations of demeanor evidence and of responses to questions." ***Rosales-Lopez v. United States***, 451 U.S. 182, 188 (1981) (plurality opinion) ("the determination is essentially one of credibility, and therefore largely one of demeanor" that reviewing courts accord "special deference." ***Patton v. Yount,*** 467 U.S. 1025, 1038 (U.S.1984)); ***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). Here, there is no basis for deferring to the trial court under controlling U.S. Supreme Court and Tenth Circuit precedent.

None of the recognized bases for deference to a factual conclusion regarding juror partiality apply in this case because the trial judge never once visited Taos County. ***See U.S. v. Wittig*** 2005 WL 758605, *6 (D.Kan 2005) ("[T]he Court is in a unique position to judge any possible prejudice in the venire because it presided over defendants' prior trial and conducted very extensive *voir dire* in the Kansas City division.")

No federal authority has been cited by the State that allows the State of New Mexico to exclude all Taos County jurors upon a lesser standard of prejudice than is required under the Fourteenth Amendment merely because it is relying on a state venue transfer statute. ***State v. House*** 127 N.M. at 167 (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) It is reasonably probable that the frenzied publicity in this case tended to solidify the opinions of so many Taos residents that the fairness of a third trial in that community would be questionable." State v. House 127 N.M. 151, 174, 978 P.2d 967, 990 (N.M.,1999) No deference is due the trial court's determination of community wide irrevocable bias as a finding of fact entitled to the presumption of correctness under 28 U.S.C. § 2254(e)(1). The claim of irrevocable community wide bias was pretextual and the trial court's presumption that it was so was manifestly erroneous.

**C. The New Mexico Supreme Court's Failure to Require a *Batson* Step-Three Analysis was Contrary to Well Settled Federal Law**

> ***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. By holding that a "reasonable probability of prejudice," in the existing venue arising from pretrial publicity was all that was necessary to move the case to a venue with practically no members of defendant's race, the New Mexico Supreme court failed to follow controlling federal jurisprudence in two ways. First, the jurisprudence that contemplates an overwhelming record of bias exist before a presumption of community wide prejudice is made was rejected in favor of a much lower proof standard. ***See State v. House***, 127 N.M. 151, 165, 978 P.2d 967, 981 (N.M., 1999). Second, by never requiring an explicit ***Batson*** type review of the prosecution's motives and by reviewing the trial court decision on an abuse of discretion standard, the Court failed to follow post-***Batson*** jurisprudence that seeks to ensure jurors are not excluded based on racial grounds.

A modified ***Batson*** test under a state statute that allows the offensive use of a venue transfer statute by

the prosecution to purposefully select and obtain a venue with less than 1% Indians, and that the State's own polling data established exhibited a greater predisposition to find Petitioner guilty than the potential jurors in Taos County, without any mandatory evaluation of the State's motives is contrary to well settled federal law. ***See 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"); ***Id.*** 127 N.M. at 179, 978 P.2d at 995 (1999)(rejecting evidence of discriminatory intent and impact); ***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); ***R.P. at 499-502*** (defense expert showing negative impact of D.A.'s remarks on defendant); ***T.R. Vol. 16 at 51-52*** (pollster 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).

In so doing the New Mexico court overlooked the fact that federal standards for presuming community wide prejudice protect the community's interest as well as that of a defendant's and may not be lowered to the point that a judge that never visited a venue may presume the community is biased. The mere invocation of state law will not shield the Court's actions from federal equal protection and due process minima. Moreover, the Court said, "we base our ***Batson***-venue analysis upon federal equal protection principles." ***House,*** 127 N.M. at 178 but never imposed any duties on state fact finders that correspond to ***Batson's*** careful

fact-sifting requirements. ***House***, 127 N.M. at 179 (Court relying on its "discussion of the venue order" to meet ***Batson*** step three review.)

But in its discussion of the venue transfer, its review was not based on federal standards regarding presumptions of community wide prejudice, nor on ***Batson***-type equal protection principles that would require the interests of the defendant and the community be protected. Instead the State's venue transfer request was allowed on a standard unknown in federal law, that required only that "an unfair trial is reasonably probable" in the existing venue to justify the transfer. ***See State v. House***, 127 N.M. 151, 165, 978 P.2d 967, 981 (N.M., 1999)

**D. Petitioner Does Not Contend that *Voir Dire* is Mandatory in all Cases. Petitioner Contends That *Voir Dire* is Required in This Case Because the Allegations of State Action to Exclude Indians Coupled with the Trial Judge's Lack of First Hand Experience with the Veniremen and Community, Foreclosed Reliance on a Presumption of Prejudice.**

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.** On such a record, there is no federal authority that authorizes a venue transfer based on a presumption of juror impartiality. Nor should review of such a case after ***Miller-El*** too quickly conclude "it is a factual matter that the trial court is best suited to decide." ***See Slip Opinion*** *at p. 11;* ***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[.]").

Oddly, 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

It is difficult to reconcile the New Mexico Supreme Court's hot and cold approach to *voir dire*. And it is impossible to reconcile the failure to conduct *voir dire* of a single venireperson with ***Mu'Min*** because the standard used by the N.M. court to disqualify an entire community is not sufficient to disqualify a single juror under ***Mu'Min***.

**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.**

Petitioner contended in his Brief in Chief that the requirement that 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)

Petitioner recognizes that while "a defendant has no right to a petit jury composed in whole or in part of persons of his own race ··· **the defendant does have**

**the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria**." ***Batson,*** 476 U.S. at 85-86 (internal quotations, citations, and footnote omitted)(emphasis added by petitioner) Here Petitioner's claim is that he is entitled to be free of purposeful state action that amounted to unconstitutional venue shopping designed to eliminate members of his race from the venire by dislodging him from a venue that bore no constitutionally significant bias against the prosecution. ***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.") The New Mexico Supreme Court agreed 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. ***Washington v. Davis,*** 426 U.S. 229, 241 (1976)(rejecting implementations of neutral statutes to achieve discriminatory purposes) The Record Discloses Overwhelming Evidence of Discriminatory Application of the Neutral Venue Transfer Statute.

It was manifestly erroneous to conclude Dona Ana County was free from exception because the State's pollster had determined 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 (March 1995)** In other words, this direct testimony in March 1995 demonstrates it was objectively unreasonable to rely on the August 1994

evidence to believe that moving the case to Dona Ana county would diminish whatever taint may be flowing from the media and it is manifestly not a venue "free from exception." *See* NMSA 1978 §38-3-3 (requiring new venue be free of exception). Closer examination of the record undermines rather than supports the venue transfer. ***See Petition***.

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). In addition, 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").

### A. Racial Distortion of the Venire or Jury Cannot be Cured by a Conviction.

Discrimination based on race constitutes 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***)

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)

**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.**[8]

The State's Answer brief persists in mischaracterizing the Petitioner's contentions. ***See Answer Brief at p. 26.*** Petitioner made three statutory ambiguity arguments regarding his sentencing, ***see Petitioner's First Legal Memorandum in Support of Petition for Habeas Corps***, at pg. 66 ("(1) the vehicular homicide statute does not contain a preference for one alternative ground for conviction

[8] The State notes that Petitioner requested the Court of Appeals and the court declined, to vacate the reckless driving convictions rather than the DWI-related convictions after the Court had reversed the venue transfer and before the New Mexico Supreme Court took the case on certiorari. ***State v. House*** 130 N.M. at 421 (" This Court did not grant the motion.") Petitioner's request was done at a time when the case was postured for retrial and before the ultimate affirmance of his convictions. Subsequently, Petitioner challenged his DWI-related convictions and in House II the Court of Appeals agreed finding, "Defendant timely filed a Rule 5-801 NMRA 2000 motion for relief from what he claims is an illegal sentence" and thus the appellate court was "vested with jurisdiction to review the remand proceedings." ***State v. House*** 130 N.M. at 422

over the other and, (2) that the recidivist provision of § 66-8-101(D) is ambiguous and constitutionally suspect, and (3) the trial Court should have strictly construed the statute to ensure no questionable sentence was imposed".[9] ***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.)

Controlling New Mexico cases had already held the statute in question to be ambiguous on its face.[10] ***State v. Landgraf,*** 121 N.M.445 (1996) But in this case, the New Mexico Court of Appeals nonetheless found the same

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[9] 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)

[10] In a statement that is clearly and obviously wrong, the House II court concluded the ***Landgraf*** "Court expressed no opinion as to *which* theory--DWI or reckless driving--would take priority. Defendant now raises that precise issue." ***State v. House*** 130 N.M. 418, 422, 25 P.3d 257, 261 (N.M.App.,2001)("House II") In fact the holding of ***Landgraf*** *depends* on the fact that each form of vehicular homicide is co-equal and redundant and thus the question of which has "priority" even if a Court has authority to make such determinations, was already answered--no section has priority over another.

statute to reflect legislative "intent" to treat DWI-related violations as a "greater public concern" than the Reckless Driving violations it had previously found identical.

> 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) This conclusion violates controlling cannons of statutory construction and federal authority. First, when two equally reasonable statutory readings are possible, the rule of lenity requires the adoption of the one that produces the less harsh penal result.

> We may not "interpret a federal criminal statute so as to increase the penalty... when such an interpretation can be based on no more than a guess as to what Congress intended." (quotations and citations omitted).

***U.S. v. West,*** 393 F.3d 1302, 1315 (D.C. Cir. 2005); ***accord Caron v. United States***, 524 U.S. 308, 316 (1998)

Second, the conclusion that "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), is directly contrary to the ***Landgraf*** court's conclusion. Moreover, if additional punishment is the touchstone of the legislature's intent that DWI-related convictions have priority, then a two year enhancement as Petitioner concedes is appropriate serves the purpose as well as a ten year one. The U.S. Supreme court has repeatedly held that recidivist measures are not part of the underlying offense and a prior DWI conviction is not an element of either of the two co-equal vehicular homicide offenses. ***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 part of the underlying criminal offense nor is it an appropriate measure of legislative intent.

### A. 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." The N.M. legislature calibrated the penalty to stack or pyramid when there were multiple prior acts of misdemeanor misconduct rather than the stack based on the particular outcome in the instant case. The misreading becomes obvious if a three time DWI misdemeanant is considered here because recidivist misdemeanant were in this accident the total sentence would be 45 years based on a 15-year underlying sentence. Petitioner's sentence should be reduced by eight years.

**ISSUE 5: There was no Waiver of the Challenge to the Trial Judge's Impartiality.**

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.

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. 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.

*Electronically Filed /s/*

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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|---|---|---|
| **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 3rd day of March, 2006, I electronically filed an original electronic copy of the Petitioner's First Reply 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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