No. 05-2129

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GORDON HOUSE,

Petitioner-Appellant,

v.

ERASMO BRAVO, Warden, et al.,

Respondents-Appellees.

Appeal from Denial of Habeas Corpus Relief (28 U.S.C. § 2254) by
the United States District Court for the District of New Mexico,
Hon. Martha Vasquez, Chief Judge

RESPONDENTS-APPELLEES' ANSWER BRIEF

(Respondents Oppose Oral Argument)

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February 2006

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SUMMARY OF THE ARGUMENT

Petitioner, Gordon House, states no cognizable claims under the Anti-Terrorism and Effective Death Penalty Act of 1996. 28 U.S.C. § 2254 ("AEDPA" or the "Act").

No controlling decision of the United States Supreme Court prohibits a change of venue in a criminal prosecution to a community with few or no veniremen of the accused's race. The New Mexico Supreme Court's decision in this regard was not contrary to, nor did it involve an unreasonable application, of clearly established Federal law.

No controlling decision of the United States Supreme Court requires that a state trial court conduct voir dire to ascertain the probability of obtaining a fair and impartial jury before venue is changed. The New Mexico Supreme Court's decision in this regard was not contrary to, nor did it involve an unreasonable application, of clearly established Federal law.

The application of a state statute allowing the prosecution to move for a change of venue under certain circumstances did not violate clearly established federal law with respect to due process and equal protection. The New Mexico Supreme Court's decision in this regard was not contrary to, nor did it involve an unreasonable application, of clearly established Federal law.

New Mexico's sentencing enhancements for recidivist drunken drivers who kill other motorists is not ambiguous and did not warrant application of the rule of lenity. The New Mexico Court of Appeals' decision in this regard was not contrary to, nor did it involve an unreasonable application, of clearly established Federal law.

Mr. House abandoned his argument concerning the state trial judge's refusal to recuse on remand from the state supreme court by failing to properly brief the issue in the New Mexico Court of Appeals. He is procedurally barred from raising this issue in the federal courts.

STATEMENT REGARDING PRIOR OR RELATED APPEALS

No prior, related appeals have been filed in this Court.

STATEMENT OF JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction pursuant to 28 U.S.C. § 2254. This Court has jurisdiction pursuant to 28 U.S.C. § 2253.

TABLE OF REPORTED CASES

This case has been the subject of extensive appellate review. The reported decisions are as follows:

Twohig v. Blackmer, 918 P.2d 332 (N.M. 1996).

State v. House, 918 P.2d 370 (N.M. Ct. App. 1996) (*House 1*).

State v. House, 953 P.2d 737 (N.M. Ct. App. 1998) (*House 2*).

State v. House, 978 P.2d 967 (N.M.), *cert. denied*, *House v. New Mexico*, 528 U.S. 894 (1999) (*House 3*).

State v. House, 25 P.3d 257 (N.M. Ct. App. 2001) (*House 4*).

STATEMENT OF THE CASE

New Mexico state court juries convicted Mr. House of multiple charges that arose in connection with the deaths of four people and critical injuries sustained by a fifth in a head-on collision on Interstate Highway 40 in Bernalillo County, New Mexico on December 24, 1992. *House 3*, 978 P.2d at 972-73. Several cars and trucks were forced to take evasive action to avoid a collision as Mr. House drove in the wrong direction on the divided highway. *Id.* At one point, a state policeman attempted to gain Mr. House's attention with red lights, a siren, and a spotlight. Mr. House sped up. *Id.* He hit a car being driven by Paul Cravens. *Id*. The impact instantly extinguished the lives of Melanie Cravens, and her three young daughters; Mr. Cravens was seriously injured. *Id.* Mr. House had a blood-alcohol concentration of .18% shortly after his arrival at a hospital in Albuquerque and of .10% some four and one-half hours later. Significantly, at trial Mr. House testified that he drank seven and one-half beers He also admitted that his ability to drive was impaired to some degree by the consumption of intoxicating beverages.

A state court judge changed venue to Taos County upon stipulation of the parties. The Taos County jury convicted the Defendant of driving while intoxicated but was unable to reach verdicts on the homicide counts. A second trial was held in Taos County. That jury was also unable to reach a verdict on the homicide charges.

The State moved for a change of venue upon proper affidavit as required by NMSA 1978, § 38-3-3 (1965). The state court made extensive findings of fact and conclusions of law and granted the change of venue. The matter was set for trial in Doña Ana County, New Mexico. The jury returned guilty verdicts on all remaining counts. Between the second and third trials, Mr. House challenged the imposition of a gag order. That issue was resolved in his favor by the state supreme court. *Twohig*, 918 P.2d 332.

The New Mexico Supreme Court eventually affirmed Mr. House's convictions and sentences in a written opinion. *House 3,* 978 P.2d 967. The United States Supreme Court denied an application for writ of certiorari on October 4, 1999. 528 U.S. 894. After a re-sentencing hearing in the Second Judicial District Court, Mr. House lodged a second direct appeal. The New Mexico Court of Appeals denied relief on all grounds in a written opinion. *House 4*, 25 P.3d 257. While that appeal was pending, Mr. House filed a petition for habeas corpus relief in the United States District Court for the

District of New Mexico on April 26, 2000, raising various claims. That court dismissed the petition without prejudice because state remedies had not been exhausted. Mr. House also sought post-conviction relief in state court under New Mexico's habeas corpus rule. Rule 5-802 NMRA.

Mr. House filed a second application for habeas corpus relief in the federal district court.

United States Magistrate Judge Alan Torgerson proposed denying the application on the merits and granting the Respondents' motion to dismiss. United States District Court Judge Martha Vasquez adopted the magistrate's findings and conclusions as to claims three through seven. She amended and added to the magistrate's findings and conclusions as to claims one and two. She concurred in the denial of the application, but denied Respondents' motion to dismiss.

Mr. House appeals. His brief was filed on December 28, 2005, and this Court directed that an answer brief be filed. On extension, this brief is timely filed on or before February 10, 2006.

MR. HOUSE'S BURDEN UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 AND STANDARD OF REVIEW.

A. A petitioner's burden.

Mr. House addresses this Court as if he were on direct appeal. He is not. Because he seeks collateral review of a state court conviction, he must show how his case fits the narrow confines of AEDPA. Mr. House filed his application well after the effective date of the Act and its provisions governed his application for a writ of habeas corpus in the federal district court. *Upchurch v. Bruce*, 333 F.3d 1158 (10th Cir. 2003).

The Act provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As can readily be seen "[s]ection 2254(d) distinguishes between two types of erroneous decisions -- those of law and those of fact -- and treats each in separate subparagraphs." *Weaver v. Bowersox*, 241 F.3d 1024, 1029 (8th Cir. 2001). The first subsection governs claims of legal error while claims of factual error fall within the second subsection. *Id.* at 1029-30. The

Act burdens Mr. House with showing that the New Mexico courts' decisions on the issues of venue transfer, re-sentencing, and recusal of the sentencing judge were each contrary to or involved an unreasonable application of clearly established federal law, *and* were based on an unreasonable determination of the facts developed below. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court stated, "We have made clear that the 'unreasonable application' prong of § 2254 (d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts' of petitioner's case." *Id*. at 517 (citations omitted). A federal court may grant relief only when a state court has misapplied a "governing legal principle" to "a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). The application "must have been more than incorrect or erroneous . . . [it] must have been objectively unreasonable." *Id*.

Significantly, the Supreme Court has also defined "clearly established Federal law" under Section 2254(d)(1) as the governing legal principle or principles set forth by the Court in effect when the state court rendered its decision. *Bell v. Cone*, 535 U.S. 685, 696 (2002); *accord Daniels v. United States*, 254 F.3d 1180, 1184 (10th Cir. 2001) (On collateral review, a federal

prisoner may not rely on a previously unavailable rule of constitutional law unless the Supreme Court has made it retroactive.).

B. Standard of review under Section 2254(d)(1): questions of law.

Under Section 2254(d)(1), Mr. House may obtain federal habeas corpus relief on a claim adjudicated on the merits in state court only if he can show that the court's decision was either (1) contrary to, or (2) an unreasonable application of, clearly established federal law as determined by the Supreme Court. *Cone*, 535 U.S. at 694. In *(Michael) Williams v. Taylor*, 529 U.S. 362 (2000), the Court amplified the meaning of these statutory concepts and the degree of deference required to be afforded to state court determinations on the merits in federal habeas corpus proceedings brought by state prisoners under the Act. According to the *(Michael) Williams* Court, a state-court decision can be "contrary to" Supreme Court precedent only in one of two ways: "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or if the state court "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the precedent]." *Id*. at 405. The Court also stated, "the [statutory] phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of this Court's decisions as of

the time of the relevant state-court decision." *Id.* at 412. Consequently, when a state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," that decision "certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established federal law.'" *Id.* at 407. Significantly, however, "[u]nder § 2254(d)(1)'s 'unreasonable application clause,' . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 411.

C. Standard of review under § 2254(d)(2): questions of fact.

"Claims of factual error are subjected to the standard enunciated in § 2254 (d)(2); section 2254(e)(1) then establishes a presumption of correctness in favor of state court findings of fact." *Weaver*, 241 F.3d at 1030. Accordingly, this Court must presume that the New Mexico courts found the facts correctly unless Mr. House rebuts that presumption with clear and convincing evidence. *See* § 2254 (e) (1).

Mr. House simply repeats here the factual arguments made and rejected by the very courts to which such deference is due; he fails to meet

his burden. The standard was well enunciated by the Eight Circuit Court of Appeals when it held, "[O]n habeas review, we accord state trial courts broad latitude in determining questions of fact by virtue of the statutory presumption in favor of state court fact-finding." *Weaver*, 241 F.3d at 1030. This burden on habeas petitioners is indeed great. As the *Weaver* Court further noted, "Even in the extreme, an erroneous finding of fact by a state court does not justify granting a writ if those courts erred 'reasonably.'" *Id*.

ISSUE ONE: THE UNITED STATES SUPREME COURT HAS NEVER APPLIED *BATSON V. KENTUCKY* TO THE QUESTION OF VENUE SELECTION.

Mr. House incorrectly continues to argue that *Batson v. Kentucky*, 476 U.S. 79 (1986), is clearly established federal law on the issue of changing venue to a forum with a small number of potential jurors of an accused's race. He shows no record support for his atavistic claim that the prosecution used the venue transfer statute to "obtain a venue predisposed to convict and to eliminate members of the defendant's race from the venire." Opening Brief at 1 (hereinafter "OB"). No New Mexico court has ever found this bald assertion to have any basis in fact.

Mr. House does correctly observe that the Respondents' "sole rebuttal has been that no post-*Batson* decision of the United States Supreme Court has extended the holding of that case to the selection of a venue." *Id*. That

remains the Respondents' position simply because it is indisputably correct. Furthermore, the federal district court adopted the magistrate's correct conclusion that "Petitioner's *Batson* claim was not cognizable on habeas corpus review because, '[t]he clearly established federal law does not extend the ruling of *Batson v. Kentucky* . . . and its progeny to the state's motion for a change of venue even when that motion ultimately results in a venue transfer to a county which contains virtually no members of Petitioner's race." Memorandum Order and Opinion (hereinafter "Order") at 6.

Below, the magistrate judge noted and the federal district court relied on the only reported federal appellate decision on this subject, *Mallett v. Bowersox*, 160 F.3d 456 (8th Cir. 1998). Magistrate Judge's Proposed Findings and Recommended Disposition (hereinafter "MJPF&RD") at 12; Order at 6.

A closer examination of *Mallett* is warranted here. In the face of arguments strikingly similar to those advanced by Mr. House, and applying a *de novo* standard of review, the Eighth Circuit rejected nearly identical claims as those here.

As an overview of the issue, the Court held:

> We are unable to find any authority to support a conclusion that Mallett's Fourteenth Amendment rights were violated by a change of venue to a county without any, or at least a very small number of, black residents from which to draw a jury venire.

Id. at 461, *citing Epps v. State*, 901 F.2d 1481, 1483 (8th Cir. 1990).

The Court rejected outright Mallett's claim that the change of venue violated *Batson*, including a claim that the excluded jurors suffered discrimination and therefore an equal protection violation at the hands of the prosecution. The Court held:

> "[D]enial of participation on Mallett's jury could not have been on account of racial discrimination for none of the potential jurors of Schuler County (or at least a very small number of them) were black, and no black persons were members of the jury venire from which the trial jury was selected."

Mallett, 160 F.3d at 462.

In terms of Mr. Mallett's attempt to prove racial discrimination, the Court observed:

> Finally, even if we were to apply *Batson*, which we do not, Mallett would be required to make a showing of purposeful discrimination in order to establish an equal protection violation.
> . . .
> [T]he Missouri Supreme Court found "a complete void of evidence that [the transferring court's] venue decision was animated by a discriminatory purpose.

Id. at 460, citing *Mallett v. State*, 769 S.W.2d 77, 80 (Mo. 1989) (other citations omitted). This was exactly the same result reached by the New Mexico Supreme Court in Mr. House's case. *House 3*, 978 P.2d at 993 ("House suggests that the State deliberately sought a venue with fewer

Native Americans than Taos County and thus acted with discriminatory intent. House has failed to prove this contention.").

Significantly, unlike Mr. Mallett's venire, the Doña Ana County panel included prospective jurors of Mr. House's race. *Id.* at 997 (Indians comprised 4.42% of venire.). In fact, Mr. House excused two Indians from jury service without a timely explanation. He did not object to the panel as finally seated. *Id*. at 997. Under New Mexico law, the failure to object to the jury as empanelled constitutes a waiver of irregularities *State v. Arellano*, 965 P.2d 293, 296 (N.M. 1998).

The Eighth Circuit also held that "the change of venue procedure employed here did not deprive Mallett of the fundamentally fair trial he was due." *Mallett*, 160 F.3d at 462. In Mr. House's appeal, the New Mexico Supreme Court reached the same result:

> Moreover, House offered no proof that he was tried before a biased jury in Doña Ana County. He presented no evidence that any of the jurors who actually heard the case were in any way tainted by publicity, fixed opinions, racial prejudice, or any other factor that would bring the fairness of the trial into question.

House 3, 978 P.2d at 997.

Finally, the *Mallett* Court considered the application of *Estes v. Texas*, 381 U.S. 523 (1965). In *Estes*, the Supreme Court held, "[A]t times a procedure employed by the State involves such a probability that prejudice

will result that it is a deemed inherently lacking in due process." *Id*. at 542-43. The Eighth Circuit considered this claim, rejected it and held:

> [W]e decline Mallett's invitation under *Estes* to infer prejudice solely from the circumstances that the transferring court transferred venue to a county with no black residents. . . . To hold that prejudice may be inferred simply because the jury included no jurors of Mallett's race . . . would amount to holding that Mallett is entitled to have members of his race on the jury.

Mallett, 160 F.3d at 462, *citing Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (defendants in criminal cases are simply not entitled to a jury of any particular racial composition). Again, the New Mexico Supreme Court came to the same conclusion when it stated, "It is, in fact, preposterous – and a form of racism – to presume that persons of a particular color will perform jury duty in a particular way." *House 3*, 978 P.2d at 995.

The state supreme court also analyzed and applied a series of Supreme Court precedents including *Batson*, *Powers v. Ohio*, 499 U.S. 400 (1991); *Purkett v. Elem*, 514 U.S. 765 (1995); and *Hernandez v. New York*, 500 U.S. 352 (1991), concluding that the principles announced in this series of cases could be adapted, under some circumstances, to a claim of discriminatory selection of a venue. *House 3*, 978 P.2d at 993-94.

The court fashioned and then applied a modified-*Batson* standard to what occurred in this case. Although they concluded that Mr. House had, through circumstantial evidence, made a *prima facie* showing of racial

discrimination, they also found that the prosecution offered a race-neutral explanation for the requested venue change. This circumstance left the decision to trial court's discretion. *Id*. at 994. Ultimately, the court found that the "the selection of Doña Ana County . . . was race-neutral" and there was "no proof of discriminatory intent." *Id.*

To the extent that Mr. House claims the state supreme court misapprehended controlling federal law, it can readily be seen that the court considered all Supreme Court precedents that were current at the time of their decision and properly denied relief on every ground he asserted. *(Michael) Williams*, 529 U.S. at 405. As the application of federal law here was neither "incorrect" nor "erroneous," it certainly cannot be seen as "objectively unreasonable." *Andrade*, 538 U.S. at 75.

To the extent that the court relied on the New Mexico constitution and statutes on such issues as vicinage and venue transfer, this Court may not grant relief even if it determines it misinterpreted its own laws. Misinterpretation of state law by its own courts does not present a cognizable claim under the Act. *Rael v. Sullivan*, 918 F.2d 874, 877 (10th Cir. 1990) (Misinterpretation of New Mexico law by New Mexico courts cannot form the basis for habeas corpus relief.); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (State courts are the ultimate expositors of state law.

Supreme Court is "bound by their constructions except in extreme circumstances . . .").

Mr. House's contention that, "The United States Supreme Court has clearly established . . . that the protections afforded by the Fourteenth Amendment are at work in all the proceedings of public criminal prosecution, including venue transfers" is wrong. OB at 3. *Batson* stands for no such proposition and no decision of the Supreme Court has ever so much as hinted that it does.

Mr. House continues to place extensive reliance on the Supreme Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). He fails to note, however, that *Miller-El* is strictly a *Batson* jury selection case and does not bear on the issue of venue transfer. Moreover, as the federal district court noted, even if the case is arguably applicable to the claims here, it was decided long after the New Mexico Supreme Court considered Mr. House's appeal. Order at 7-8, *citing Teague v. Lane*, 489 U.S. 288 (1989) (Supreme Court decisions are retroactive on collateral review under the rarest of circumstances.). *See also Schriro v. Summerlin*, 542 U.S. 348, 352 (2004).

In the end of the end, the federal district judge concluded, "Because *Batson* is not the clearly established law to apply to Petitioner's claim, the New Mexico Supreme Court could not, by definition, run afoul of the

provisions of 28 U.S.C. § 2254(d).” Order at 7. This ruling is absolutely correct and Mr. House demonstrates no reason why this Court should disturb it.

ISSUE TWO: NOTHING REQUIRES A STATE TRIAL JUDGE TO CONDUCT VOIR DIRE BEFORE GRANTING THE PROSECUTION’S MOTION FOR CHANGE OF VENUE.

In his objections below, Mr. House contended that the magistrate’s conclusion that voir dire is not required before venue can be changed was incorrect. Citing again to *Mu’Min, v. Virginia*, 500 U.S. 415 (1991), Mr. House continues to complain that “well settled federal law establishes that voir dire is essential to determining disqualifying prejudice in the entire venire as a result of pretrial publicity. OB at 24.

The federal district court rejected this argument under *Mu’Min*, concluding:

> Petitioner’s confusion stems from a misunderstanding of the procedural posture of the Supreme Court cases he cites. . . . The Supreme Court’s change of venue jurisprudence has developed around claims of defendants, who, after being denied a change of venue motion by the trial court, alleged that their due process rights had been violated.

Order at 10.

The court also noted that the New Mexico Supreme Court had decided this question in part based on state law. Order at 12. Indeed, as detailed in

succeeding argument sections below, that court considered several aspects of venue transfer beyond the question of conducting voir dire.

After reviewing the record of the venue transfer hearing and applying Section 2254(d)(2), the federal district court concluded that the decision to move the trial did not constitute an unreasonable determination of the facts. Opinion at 14. (The facts established in the state district court were "not unreasonable bases for [the judge's] decision and the Court does not find them to be such.").

Mr. House also fails to note that pervasive pre-trial publicity issues are inherently different when applied to the selection of a venue. In fact, the Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), recognized that a change of venue rather than extensive voir dire or a prior restraint on speech is the preferred remedy when attorney comments may have affected the opinions of the venire:

> Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.

Id. at 1075.

Nothing in New Mexico or federal case law indicates that the trial judge here employed an incorrect standard when considering the prosecution's application for a change of venue. Again, Mr. House fails to cite to any controlling or even persuasive authority from the Supreme Court to support this argument. The state supreme court concluded that a state trial court can in its discretion properly change venue without conducting voir dire where evidence supports "a presumption that pretrial publicity has rendered a fair trial improbable." *House 3*, 978 P.2d at 984. The court reviewed the matter for an abuse of discretion and determined that the trial court, indeed, did not abuse its discretion when it found "many indicia of prejudice in Taos County" that resulted in the change of venue without first conducting voir dire. *Id.* at 990. Notably, in arriving at their decision, the court relied in part on *Patton v. Yount,* 467 U.S. 1025 (1984), and *Mu'Min,* 500 U.S. 415.

ISSUE THREE: USE OF NEW MEXICO'S UNIQUE VENUE TRANSFER STATUTE DOES NOT CONSTITUTE STRUCTURAL ERROR.

Mr. House continues to argue that he was entitled, i.e., had the right, to be retried in Taos County after two mistrials and that the change of venue amounted to a "'structural error' for which no prejudice need be demonstrated and is not subject to harmless error analysis under *Arizona v.*

Fulminante, 499 U.S. 279 (1991).” OB at 36. The New Mexico Supreme Court rejected similar arguments and the federal district court agreed.

The state supreme court extensively reviewed and considered all of Mr. House’s venue claims. The court initially considered the proper standard of review and Mr. House’s demand for strict scrutiny. *House 3*, 978 P.2d at 977-81.

The court discussed this demand for heightened scrutiny and whether prosecutors bear an increased burden of persuasion when they move for a change of venue. The court rejected the application to venue selection issues of the increased burden on a party seeking a gag-order to stem pre-trial publicity that was announced in *Twohig*, 918 P.2d at 338. The court also rejected the reasoning of the court of appeals found at *House 2*, 953 P.2d at 745, and determined that long standing New Mexico precedent requires only that a party show a “reasonable probability” that a fair trial cannot be had in a particular venue. *House 4*, 978 P.2d at 979. Thus, the State bore no heavier burden in its request for a change of venue than any other party to any other lawsuit, despite Mr. House’s objection to the transfer.

The court next focused its attention on whether the State used the venue statute to achieve what they called “venire discrimination,” a claim Mr. House raises here. OB at 39. Initially, the court examined and rejected

Justice Marshall's dissent in *Mallett v. Missouri,* 494 U.S. 1009 (1990) (Marshall, J., dissenting) (State trial courts should be prohibited from transferring venue of a trial to accomplish exclusion of veniremen of the accused's race.). The court noted that this brief dissent was one of few "judicial pronouncements" on the subject. *House 3,* 978 P.2d at 993. The court then considered Mr. House's related claim, repeated here, that the prosecution deliberately sought a venue with fewer Indians and did so with discriminatory intent. Particularly germane to Mr. House's burden before this Court, the state supreme court held, "House has failed to prove this contention." *Id.* at 993. *See Houchin v. Zavaras*, 107 F.3d 1465 (10th Cir. 1997) (AEDPA increases deference to be paid by federal courts to factual findings of the state courts.).

Having established that the venue transfer was not deliberately accomplished with a "discriminatory intent," the state supreme court then turned its focus to whether the transfer had a "discriminatory impact" on Mr. House because of the reduced numbers of Indians in the geographical region chosen. The court stated, "There is simply no constitutional requirement in New Mexico that, prior to a venue change, a court must consider the percentage of prospective jurors who are of the same race as the defendant." *House 3*, 978 P.2d at 995. The court went on to say, "Courts have

overwhelmingly been unwilling to summarily conclude that the citizens in an entire geographical region . . . are tainted by racial prejudice." *Id.* at 995. The court concluded, "Thus, in the selection of the venue in Doña Ana County, Mr. House has shown neither that the State acted with discriminatory intent, nor that the venue change had a discriminatory impact on his right to a fair trial." *Id.* at 996.[1] Ultimately, the court held, "The trial court diligently sought a fair venue in which to hold the third trial." *Id.* at 997. Significantly, the court noted that during jury selection Mr. House offered no evidence that any of the prosecutor's challenges to prospective jurors was based on ethnicity, that Mr. House himself excused two Indian jurors, and that he did not object to the jury that was eventually seated. *Id*. at 998.

The ultimate question in any inquiry such as the one undertaken here, is whether the accused was afforded a fair trial under the constitution. After noting that Mr. House had failed to show any pattern of exclusion of any particular group from the jury panel that would support an equal-protection claim under *Castaneda v. Partida,* 430 U.S. 482 (1977), the state supreme

[1] The state supreme court also examined New Mexico's unique vicinage provisions found at N.M. CONST. art. II, § 14, and NMSA 1978, § 38-3-3 (A), concluding Mr. House waived his "[state] constitutional right to be tried in the county in which the crime was committed." *House 3*, 978 P.2d at 991.

court held, "We conclude based on exhaustive examination of the record, that House received a fair trial in Doña Ana County." *House 3*, 978 P.2d at 997.

In concluding its opinion, the court wrote:

> Substantial evidence supports the reasonable probability that a fair trial could not be obtained in Taos County, and the trial court did not abuse its discretion by ordering a venue transfer to Doña Ana County. Though House argued he was prejudiced by the move to a venue with few Native Americans, he failed to present evidence that the third jury was biased or that his third trial was unfair. Without supporting evidence, House's claims of prejudice must fail.

978 P.2d at 998.

As the federal district court determined,

> [T]his Court cannot say that, on the whole the New Mexico Supreme Court's "modified" *Batson* analysis was unreasonable. The court went through an analysis of all the steps, considered evidence that would bear in favor of the state and Petitioner, and reached a conclusion as to the trial court's state of mind.

Opinion at 9.

This Court must accord these findings of the New Mexico Supreme Court their due deference as the federal district court did. The lower court's ruling should not be disturbed in these proceedings. *Case v. Mondragon*, 887 F.2d 1388, 1393 (10th Cir. 1989) ("The presumption [of correctness] applies to basic, primary, or historical facts and the inferences that can properly be drawn regarding them."). Mr. House has not shown "an unreasonable

determination of the facts" or an objectively unreasonable application of the law. *Wright v. West*, 505 U.S. 277 (1992); *Early v. Packer*, 537 U.S. 3, 7-8 (2003) (per curium)

ISSUE FOUR: SENTENCING ISSUES.

Mr. House generally attacks New Mexico sentencing schemes. He challenges the New Mexico Court of Appeals' decision rejecting his contentions that the sentence imposed violated his right to due process and equal protection, resulting from "pyramiding" of sentencing enhancements. OB at 53.

At the outset it should be noted that in his first appeal, Mr. House asked the state court of appeals to vacate only his convictions for homicide and great bodily injury *by reckless driving* under the newly announced rule in *State v. Landgraf*, 913 P.2d 252 (N.M. Ct. App. 1996). Document No. 9, Exhibit A at 30; Exhibit D at 1. In its answer brief, the State readily conceded this issue. Document No. 9, Exhibit C at 32. Thus, the issue raised in the federal courts below and again here was raised and conceded in Mr. House's direct appeal. On remand, although the state district court's vacation of those sentences had become merely a ministerial act, Mr. House objected nonetheless. After a lengthy hearing, the court vacated the homicide and great bodily injury by reckless driving sentences and re-

imposed only the sentences for homicide and great bodily injury by driving while intoxicated. The court sentenced Mr. House to the same twenty-five year term previously entered. Document No. 9, Exhibit P. Consequently, Mr. House was accorded the exact relief in the state district court that he requested in the state court of appeals.

Although the state court of appeals declined to apply the law-of-the-case doctrine to the sentencing issues and permitted a second appeal, it denied all relief. *House 4*, 25 P.3d at 267. In doing so, the court relied on unique provisions of state law as well as several lines of New Mexico cases that are rooted in United States Supreme Court jurisprudence.

A unanimous court determined that each death that occurs in a multiple-homicide episode of driving while intoxicated is a distinct homicide and constitutes a separate violation of the statute. *House 4*, 25 P.3d at 262. In arriving at this conclusion, the court relied on *State v. Herron*, 805 P.2d 624 (N.M. 1991), in which the state supreme court applied the rule of lenity announced in *United States v. Bell*, 349 U.S. 81 (1955). In *Herron*, the state supreme court established a formula for determining when a single criminal episode can yield multiple offenses. 805 P.2d at 627. Among several factors, most of which concerned the temporal and geographical proximity of the criminal acts, the court also noted that injuries to multiple victims will likely

give rise to multiple offenses. *Id.* at 631. In terms of the rule announced in *Herron* concerning the proper unit of prosecution, the court relied on the double jeopardy principles announced by the Supreme Court in *Whalen v. United States*, 445 U.S. 684 (1980).

Mr. House continues to assert that because he was charged under two separate theories, the rule of lenity dictates that only his conviction for the offense carrying the "lesser" punishment should have been imposed. OB at 55. The problem with this notion is that the statute does not create two offenses with two different punishments. It merely provides two ways to commit the same crime: by driving while intoxicated or by driving recklessly. NMSA 1978, § 66-8-101 (A) (1991). The punishment is the same no matter how the offense is committed. § 66-8-101 (C); *House 4*, 25 P.3d at 261 (homicide by vehicle is a third-degree felony regardless if committed while intoxicated or when driving recklessly).

In examining the statute in question, the state court of appeals applied the general rules of statutory interpretation used in New Mexico. The court returned to its decision in *Landgraf*, having been asked for the first time to determine which of two sets of convictions would stand when a jury returns verdicts on both. The court then rejected Mr. House's contention that the statute was "irreducibly ambiguous," and that the rule of lenity required

imposition of sentences only under the homicide by reckless driving theory. The court noted that the legislature obviously viewed homicides committed by drunken drivers as graver than those committed by reckless drivers because the lawmakers had tied a sentencing enhancement to deaths caused by repeat drunk drivers. This enhancement was the very thing about which Mr. House complained on appeal. *House 4*, 25 P.3d at 262.

The *Landgraf* decision also has its roots in the double jeopardy jurisprudence announced by the Supreme Court in *Whalen*, 445 U.S. at 697 (Two statutory provisions that describe the same offense do not authorized multiple punishments in the absence of "contrary legislative intent.") (Blackmun, J. concurring), *Blockburger v. United States*, 284 U.S. 299 (1932) (same-elements test), and *Busic v. United States*, 446 U.S. 398 (1980) (application of the rule of lenity to penal statutes). Thus, the state court of appeals' earlier decision in *Landgraf* as applied to the issues in Mr. House's second direct appeal, did not constitute an "unreasonable application" of clearly established federal law, nor was it based on "an unreasonable determination of the facts." *Packer*, 537 U.S. at 7-8.

As to Mr. House's complaint that the sentencing enhancement found in Subsection D of the statute in question is constitutionally ambiguous, the state court of appeals, relying on *State v. Anaya*, 933 P.2d 223 (N.M. 1997),

held, “We strictly construe criminal provisions, in light of the liberty interests at stake.” *House 4*, 25 P.3d at 264. The court also acknowledged its duty to avoid a “strained or unnatural construction [of statutes] in order to work exemptions from their penalties.” *Id*., *quoting Ex Parte DeVore*, 136 P. 47, 49 (N.M. 1913). The court, however, rejected the rule of lenity because in their view the sentencing enhancements were properly applied to “[t]he occurrences for which Defendant was sentenced [i.e.,] . . . the individual homicides he committed and injuries he caused, not his single act of unlawful operation of a motor vehicle.” *Id*. at 264.

A review of the state supreme court’s holding in *Anaya* reveals a reliance on *State v. Edmondson*, 818 P.2d 855 (N.M. Ct. App. 1991), which, in turn, relied on *Moskal v. United States*, 498 U.S. 103 (1990). The *Moskal* Court held that when a claim of ambiguity is raised, a reviewing court should only resort to the rule of lenity after utilizing all traditional methods of statutory construction, e.g., plain language, legislative history, or factors motivating enactment. If the reviewing court is “left with an ambiguous statute,” then and only then, should it apply the rule of lenity. *Id*. at 108. (citations and internal quotations omitted). Here, the state court of appeals declined to go that far because earlier, prevailing state precedents had already settled myriad issues raised by the various legislative schemes that

provide that enhanced punishments be added to basic sentences for recidivists. *House 4*, 25 P.3d at 264.

Finally, the state court of appeals rejected both of Mr. House's arguments under the Fourteenth Amendment. He argued that he was subjected to disparate treatment when compared to recidivist felons who receive enhanced sentences under New Mexico's general habitual offender scheme. *See* NMSA 1978, § 31-18-17 (1993). Describing Mr. House's argument as "circuitous," the court held that Subsection D does not violate the Equal Protection Clause by providing disparate treatment for repeat drunk driving offenders as compared to general recidivists. *House 4*, 25 P.3d at 265. The court also noted that Mr. House had actually claimed "a misapplication of the enhancement provision," rather than an ambiguity in the statute. *Id.*

The court reviewed and rejected all of these constitutional claims, concluding:

> Defendant fails to cite any authority discussing the constitutional implications of the conduct he alleges, and further fails to show how the district court committed the wrong he alleges. Nonetheless, we glean from his argument an attempt to correlate his claim with those made in *Anaya*, [933 P.2d 223]; that is, he suggests that no number of misdemeanor conviction can add up so as to constitute a felony. Our response takes us no further than the ruling in *Anaya* itself: the sum of Defendant's prior convictions comprises a status *for sentencing purposes only*.

House 4, 25 P.3d at 266 (emphasis in original).

As can readily be seen, the state court of appeals reached each conclusion by applying well-settled New Mexico precedents that are rooted in decisions of the United States Supreme Court. Mr. House has not demonstrated how the court's opinion "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States[.]" § 2254 (d)(1). Not once in his brief here does he attack the application of the cases relied upon by the state court of appeals or their sources. Not once does he shoulder his burden to undertake the analysis necessary for this Court to reverse the federal district court and grant his release. All he does is make the unsupported and conclusory assertion that the state courts somehow misapplied binding federal precedent. *See Walker v. Gibson*, 228 F.3d 1217 (10th Cir. 2000) (Conclusory allegations will not support habeas corpus petition.), *abrogated on other grounds Neill v. Gibson*, 278 F.3d 1044 (10th 2001); *see also Humphreys v. Gibson*, 261 F.3d 1016, 1022 n.2 (10th Cir. 2001).

The magistrate concluded, "The classification of recidivist DWI misdemeanants subsequently convicted of DWI-related vehicular homicides or great bodily injury for sentencing enhancement is not contrary to nor does

it involve an unreasonable application of clearly established federal law." MJPF&RD at 29. This conclusion is correct.

Furthermore, even if it could be reasonably argued that the state court of appeals misapplied its own cases or incorrectly interpreted the penal and sentencing statutes at issue, misinterpretation of a state law by its own courts does not present a cognizable claim under the Act. *Rael*, 918 F.2d at 877; *Wilbur*, 421 U.S. at 691. As the magistrate judge also correctly observed, "When a state court interprets its state law, the state court's determination is binding on this Court in a federal habeas corpus review." MJPF&RD at 25, *citing Chapman v. LeMaster*, 302 F.3d 1189 (10th Cir. 2002).

ISSUE FIVE: THE TRIAL JUDGE'S REFUSAL TO RECUSE ON REMAND.

Mr. House claims that the state trial judge was required to recuse himself on remand after the state supreme court affirmed his convictions. He attempted to raise this issue on direct appeal in the state court of appeals. In its opinion that court noted:

> Finally, Defendant challenges the district court's denial of his motion to recuse Judge Blackmer. He captions his argument as a constitutional challenge to the procedure afforded under New Mexico law. However, he makes no substantive argument regarding the alleged insufficiency of our procedure, relying instead primarily upon recitation of general language pertaining to the need for impartial tribunals. He also appears to challenge the ruling below as an abuse of discretion. Nonetheless, he has not presented to this Court a discussion of the facts relevant to our review. He also fails to note that

> his motion has already been reviewed not only by the district court, but also by our Supreme Court -- neither of which discerned any basis for recusal. We deem the matter waived as insufficiently briefed. *See* Rule 12-213 NMRA 2000.

House 4, 25 P.3d at 266-67.

Thus, the state court of appeals unequivocally refused to consider this claim because it had been waived. The failure to provide the pertinent facts to the state court of appeals was a direct violation of Rule 12-213 (A) (4) NMRA (All briefs must contain a "statement of how the issue was preserved in the court below with citations to…[the] transcript of proceedings or exhibits relied on."). *See also State v. Clark*, 990 P.2d 793 (N.M. 1999) (reference by incorporation is unacceptable briefing practice). This ill-advised practice amounted to an abandonment of the issue in his appeal under New Mexico's rules of appellate procedure.

The magistrate judge correctly concluded, "The finding of the New Mexico Court of Appeals that the claim was inadequately briefed and therefore abandoned is supported by the record and is presumed to be correct." MJPF&RD at 32.

Before this Court Mr. House contends, "It is well-settled that where there is no actual violation of the state procedural rule cited by the Court, there is no default." OB at 64. For this proposition, he relies in part on *Trevino v. Texas*, 503 U.S. 562 (1992) (per curium). He fails to note,

however, that *Trevino* was a direct appeal, not a habeas corpus action, and the issue at hand was the preservation of a Fourteenth Amendment claim that the prosecution had used discriminatory challenges to prospective jurors. The Court noted that it had specifically provided that the rule announced in *Batson* would apply to all pending cases on direct review.

Mr. House also relies on *Ford v. Georgia*, 498 U.S. 411 (1991). In that case the Court found Georgia's preservation requirements lacking and found that Mr. Ford had sufficiently alerted the state district court to preserve his claim of federal constitutional error. Notably, neither of these cases addresses the failure to adequately present an argument to a state appellate court on direct review.

Moreover, *Trevino* and *Ford* establish exceptions, not rules. Mr. House overlooks the general rule which remains a state procedural default is a bar to review. *Walker v. Attorney General*, 167 F.3d 1339, 1344 (10th Cir. 1999) (Absent cause or prejudice or a fundamental miscarriage of justice, Federal habeas corpus review is barred if a claim is procedurally defaulted under "an adequate and independent state procedural rule."). The Supreme Court also acknowledged this in *James v. Kentucky*, 466 U.S. 341, 348 (1984) (A "firmly established and regularly followed state practice" may be interposed by a State to prevent review of a federal constitutional claim by

the Court.). "A state procedural rule is independent if it relies on state law, rather than federal law, as the basis for the decision." *English v. Cody,* 146 F.3d 1257, 1258 (10th Cir. 1998); *accord Watson v. State of New Mexico,* 45 F.3d 385, 386 n.1 (10th Cir. 1995).

Here, the magistrate judge determined, "Petitioner's seventh claim [the issue of recusal] may not be reviewed on the merits by this Court because it was procedurally defaulted in the state appellate court below." MJPF&RD at 32. The federal district court judge ratified this decision. This conclusion is sound and Mr. House's repetition of the same arguments here do not call this decision into genuine question.

CONCLUSION

What Mr. House sought below and continues to seeks here is a direct, full-record, *de novo* review of the decisions of the trial court, the New Mexico Court of Appeals, and the New Mexico Supreme Court. Such relief is simply not available to him under AEDPA.

In these proceedings, Mr. House has never shown an unreasonable determination of the facts or an objectively unreasonable application of the law. *West,* 505 U.S. at 305 (an *unreasonable* application of federal law is different from an *incorrect* application of federal law). A federal habeas court may not grant relief even if it independently concludes that the state-

court decision applied clearly established federal law erroneously or incorrectly. The application must also be unreasonable. Consequently, Mr. House's complaints here about the magistrate's findings and proposed disposition and the federal district court judge's order expanding and ratifying that decision are not well-taken.

This Court should deny all requested relief.

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CERTIFICATE OF SERVICE

I certify that this copy of this Answer Brief was mailed on this 6th day of February 2006, to counsel for Petitioner:

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_____
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STATEMENT REGARDING ORAL ARGUMENT

Mr. House has requested oral argument. Respondents object to oral argument in this case for the following reasons:

1. As demonstrated above, Mr. House states no claims that even remotely come within the purview of ADEPA and thus, the dispositive issues have been authoritatively decided. Fed. R. App. P. 34 (B).

2. Preparation for and travel to an oral argument would constitute an unnecessary expense to the citizens of New Mexico.

3. This case has been pending in one court or another for over thirteen years. The time to schedule and prepare for oral argument would delay a decision of this Court and once again preclude finality and closure for the victims' families.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)(B)

I certify that this answer brief conforms to the type-volume limitations of Fed. R.App.P.32(a)(7)(B). It is printed in 14-point type with, as reported by word processing software, a total of 7835 words.

Steven S Suttle
Assistant Attorney General

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CERTIFICATE OF PRIVACY REDACTIONS AND VIRUS SCANNING

I, Steven S Suttle, certify that all required privacy redactions have been made and, with the exceptions of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk and that the digital submissions have been scanned for viruses with the most recent version of a commercial scanning program, i.e. eTrustAntivirus, Version 7.1.192, updated February 7, 2006, and according to the program, are free of viruses.

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I hereby certify that one true and correct copy of the foregoing motion was sent by first class mail, postage prepaid, and submitted in digital form via e-mail to the Clerk of the Court of Appeals for the Tenth Circuit, Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257, e-submission@ca10.uscourts.gov, and sent in digital form via e-mail to William J. Friedman, Esquire, wfriedman@cov.com and sent by first class mail, postage prepaid to 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2401.

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