BRAD D. BRIAN (CA Bar No. 079001, *pro hac vice*)
Brad.Brian@mto.com
LUIS LI (CA Bar No. 156081, *pro hac vice*)
Luis.Li@mto.com
TRUC T. DO (CA Bar No. 191845, *pro hac vice*)
Truc.Do@mto.com
MIRIAM L. SEIFTER (CA Bar No. 269589, *pro hac vice*)
Miriam.Seifter@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100

THOMAS K. KELLY (AZ Bar No. 012025)
tskelly@kellydefense.com
425 E. Gurley
Prescott, Arizona 86301
Telephone: (928) 445-5484

Attorneys for Defendant JAMES ARTHUR RAY

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S. LANDINO

SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 Hon. Warren Darrow DIVISION PTB **DEFENDANT JAMES ARTHUR RAY'S RENEWED MOTION TO CHANGE PLACE OF TRIAL PURSUANT TO ARIZ. R. CRIM. P. 10.3** *EXPEDITED EVIDENTIARY HEARING REQUESTED*

Defendant James Arthur Ray, by and through undersigned counsel, hereby renews his motion to change the place of trial. This motion is supported by Defendant's Motion To Change Place of Trial Pursuant to Ariz. R. Crim. P. 10.3, filed June 29, 2010, and by the following supplemental Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On September 20, 2010, this Court noted that "[t]he extensive media coverage of this case is a source of concern with regard to the ability to empanel a fair and impartial jury." Under Advisement Ruling on Motion to Change Place of Trial, Sept. 20, 2010, at 1. The legitimacy and gravity of that concern is now undeniable. The juror questionnaires reveal "widespread community prejudice against" Mr. Ray in Yavapai County. *See, e.g.*, *Stroble v. State*, 343 U.S. 181, 194 (1952). Questionnaire after questionnaire reflects community members who have been steeped in unfavorable media portrayals of Mr. Ray and have formed a firm opinion of his guilt. Indeed, the defense submits—and will show, at an evidentiary hearing on this motion—that there has ***never*** been an Arizona case with the depth and intensity of the prejudice involved here. The jury pool plainly cannot be described as "undisturbed" by the "huge . . . wave of public passion" that has preceded this trial. *See Irvin v. Dowd*, 366 U.S. 717, 728 (1961). Mr. Ray's constitutional rights to a fair trial and due process require a change in venue.

The fact that some media coverage of Mr. Ray's trial has been national in scope does not lessen the need for a venue change. "It is the *effect* of publicity on a juror's objectivity that is critical, not the extent of publicity." *State v. LaGrand*, 153 Ariz. 21, 34 (emphasis in original), *cert. denied,* 484 U.S. 872 (1987). And as discussed below, courts in our nation have long recognized that prejudice against the accused tends to run particularly high in the jurisdiction where a crime allegedly occurred—a tendency that is heightened in small communities. *See, e.g.*, *Irvin v. Dowd*, 366 U.S. at 726 (petitioner alleged that his "awaited trial . . . had become the cause *ce le bre* of this small community"); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963) (murder occurred in a parish of 150,000, and the degree of media exposure "never took place before" in the parish). Such is the case in Yavapai County. The problem is not merely that members of the community have been steeped in continuing, unfavorable media portrayals of Mr. Ray, but also that they have, individually and collectively, stewed over the inflammatory accounts and come to view the case as part of their community's experience. As in *Irvin*, "this continued adverse publicity" has "caused a sustained excitement and fostered a strong prejudice among the people

of" Yavapai County. *Irvin*, 366 U.S. at 726.

Other Arizona jurisdictions—in particular, Maricopa County—offer a much greater chance of a fair trial by an impartial jury. Although some coverage of this case surely has reached that county, its residents have not lived and breathed that tragedy for the past year. Moreover, the presence of the large metropolitan area of Phoenix—the largest city in Arizona and the fifth largest city in the United States—increases the likelihood of seating an impartial jury. The Supreme Court has "emphasized in prior decisions the size and characteristics of the community in which the crime occurred," and recently noted that the "large, diverse pool of potential jurors" in Houston, Texas—the nation's fourth most populous city—increased the likelihood of empaneling an impartial jury. *Skilling v. United States*, 130 S.Ct. 2896, 2915 (2010).

In light of the strong prejudice against Mr. Ray in Yavapai County, Arizona's criminal rules and the United States Constitution entitle Mr. Ray to a change in venue. *See* Ariz. R. Crim. P. 10.3(a) ("the state or any defendant shall be entitled to a change of the place of trial to another county . . . if a fair and impartial trial cannot be had for any reason other than the interest or prejudice of the trial judge"). Maricopa County offers the best alternative venue.

II. BACKGROUND

On June 29, 2010, the Defense filed a Motion to Change Place of Trial in this matter. As the Motion explained, Mr. Ray's trial has triggered a drumbeat of inflammatory and inaccurate media coverage in Yavapai County that has so prejudiced the jury pool that a change of venue is necessary. *See* Motion to Change Place of Trial at 3-10. The State's Response characterized the Defense Motion as premature and "purely speculative." Response at 13. The State agreed, however, that actual prejudice exists—and a change of venue required—when "the jurors have preconceived notions of [the defendant's] guilt and are unable to put those notions aside." Response at 12.

This Court denied the Defense Motion without prejudice. The Court stated that "[t]he extensive media coverage of this case is a source of concern with regard to the ability to empanel a fair and impartial jury," but concluded that the record "at this time" did not warrant a change of

venue. UA Ruling at 1. The court noted that "most of [the] publicity" had occurred "more than six months prior" to the Court's ruling. *Id.*

Inflammatory and inaccurate media coverage, however, has not abated since the incident. To the contrary, sensational and unflattering media accounts continued during this Court's recent 404(b) hearing only months ago. During that hearing, the State presented witnesses who, under the relaxed evidentiary standards of Rule 104, were asked to speculate, offer hearsay, and testify well beyond their competence. For example, the State repeatedly asked witnesses how many participants at various events experienced "medical distress" without definition of the term or foundation that the witnesses were competent to identify "medical distress," however defined. In addition, the State inquired about Mr. Ray's conduct after sweat lodge ceremonies ended, despite admonitions from the Court that the testimony dangerously approached inadmissible character evidence that portray Mr. Ray as a callous person. All of this "evidence" was filmed and broadcast to what now appears to be an extremely broad audience in Yavapai County. The same "evidence" was reported in local newspapers and posted on the internet. None of this "evidence" would be admissible at trial. Yet much of this "evidence" has been selectively edited and presented to the public by the media, all over Mr. Ray's repeated objections. *See* Minute Order, Evidentiary Hearing, Nov. 9, 2010 ("Defense Counsel objects to any witness presenting testimony as to what occurred in 2009 as such testimony may taint the potential jury pool.").

The effect of the sustained negative media coverage surrounding this case is now proven by the overwhelming results of the juror questionnaires. The unequivocal assertions of bias and prejudgment dispel any doubt that the place of trial must be moved. *See, e.g.*, Questionnaire of Juror No. 292698 ("This coverage convinced me that Mr. Ray is a con artist who has garnered a fortune by duping people. I believe his greed and inflated ego caused him to ignore the well-being of those who trusted him, and that led to the tragic deaths of three people. I would find it virtually impossible to be impartial as a juror in this case.").

III. ARGUMENT

A. The Constitution's Due Process Clause and Sixth Amendment mandate a change of venue.

"The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Skilling*, 130 S.Ct. at 2913 (quoting *Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462 (1907) (opinion for the Court by Holmes, J.)). This basic principle is mandated by the Due Process Clause and the Sixth Amendment right to trial by jury. These constitutional provisions "guarante[e] to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722; *In re Murchison*, 349 U.S. 133, 136 (1955). A juror "cannot be impartial," the Supreme Court has explained, if he "has formed an opinion" regarding the case. *Irvin*, 366 U.S. at 722 (quoting *Reynolds v. United States*, 98 U.S. 145, 155 (1878). Where a fair and impartial panel is unavailable, the place of trial must be moved. *See Irvin*, 366 U.S. at 722; Ariz. R. Crim. P. 10.3(a).

This case proves the need for such protections and mandates their application. First, the pretrial publicity regarding the events at Angel Valley Resort has saturated Yavapai County, and, combined with the community's unique experience with and interest in the case, has yielded a singularly intense degree of prejudice against Mr. Ray. Indeed, the questionnaire results confirm that the community has already come to judgment. Second, Mr. Ray's right to a change in venue is in no way undermined by the fact that some media exposure has extended beyond Yavapai County. A fair and impartial jury is significantly more likely to be empaneled in Maricopa County.

1. Mr. Ray is unlikely to receive a fair trial in Yavapai County.

To obtain a change in the place of trial, a "defendant must prove that the pretrial publicity was prejudicial and will have the likely result of depriving him of a fair trial." *LaGrand*, 153 Ariz. at 34. That standard is met here.

First, as detailed in Mr. Ray's initial Motion to Change Place of Trial, the media coverage in Yavapai County has been uniquely extensive and particularly inflammatory. *See* Motion to

Change Place of Trial at 3–10. The local television stations and newspapers have offered continuing coverage of developments in the case. The presence of local news cameras at the 404(b) hearing, and the continuing media coverage of all of the proceedings and filings in this case, ensure that the Yavapai community's exposure persists and will not subside. And there is little doubt that the media coverage in Yavapai County has been more detailed, more sustained, and more personal than the national coverage.[1]

Second, and critically, the *effect* of the media coverage has been unique in Yavapai County. *See LaGrand,* 153 Ariz. at 34 ("It is the *effect* of publicity on a juror's objectivity that is critical, not the extent of publicity") (emphasis in original); *State v. Befford*, 157 Ariz. 37, 40 (1988). The responses in the first 175 juror questionnaires clearly illustrate this effect: community members have taken special interest in the Angel Valley tragedy and have come to view the incident as part of their own community experience. *See, e.g.*, Questionnaire of Juror No. 277430 ("this case has been the topic of many social get-togethers" in Sedona); Questionnaire of Juror No. 295274 (cannot be impartial because of "newspaper articles presenting unfavorable views" and "conversations with community members and friends"). In turn, the jury pool appears irremediably tainted. *See, e.g.*, Questionnaire of Juror 300336 (can't be fair; "Horrible tragedy by greedy man"); Questionnaire of Juror 297486 (based on media coverage, "[t]here is no question that I could be unable to be a fair and impartial juror"; "this was a money-making hoax/scam in all regards").

Case law supports the common-sense conclusion that the locale of an alleged crime is where interest in a trial, emotional investment in its outcome, and prejudice against the defendant, tend to run highest; indeed, that is why change of venue rules exist. This tendency was explained, for example, by the federal district court that granted a change of venue in the trial stemming from the Oklahoma City bombings. Describing expert testimony from the proceedings, the court

[1] For example, while multiple media outlets carried a story regarding this case around the date of the one-year anniversary of the incident, the local news media included an invitation to attend a "celebration of life" ceremony at the Angel Valley Resort, along with information on how to RSVP. *See* Angel Valley Marks Anniversary of Sweat Lodge Incident, 10/6/2010, *available at* http://sedonaeye.com/angel-valley-marks-anniversary-of-sweat-lodge-incident. Even if viewed by individuals outside the Yavapai area, it is unlikely that this invitation would have been understood by them as a meaningful invitation.

stated that "people across the country wanted to know the 'who, what, where, why, and when' of this event" and were interested "in a more general sense" in "the human story of suffering and renewal." *United States v. McVeigh*, 918 F. Supp. 1467, 1471 (W.D. Okla. 1996). "In contrast," the court continued, "because this was a crime that occurred in their State, Oklahomans wanted to know every detail about the explosion, the investigation, the court proceedings, and, in particular, the victims." *Id.*

Case law also confirms that small or tight-knit communities are even more susceptible to the tendency toward locally charged prejudice. *See Rideau v. Louisiana*, 373 U.S. at 727 (murder occurred in a parish of 150,000, and the degree of media exposure "never took place before" in the parish); *Irvin*, 366 U.S. at 726 (petitioner alleged that his "awaited trial . . . had become the cause *ce le bre* of this small community"); *Coleman v. Kemp*, 778 F.2d 1487, 1539– 40 (11th Cir. 1985) (the county had a population of only 7,000, "the significance of which [was] magnified by the evidence of the community's and the jury's friendship and sympathy for the victims and their family"). This factor is significant in Yavapai County, where the population is approximately 215,000.

The Supreme Court's recent decision in *United States v. Skilling* underscores the need for a venue change. In concluding that no Due Process violation had occurred in Skilling's case, the Court placed emphasis on several protective factors, none of which is present here. First, the "size and diversity" of Houston, Texas—the fourth most populous city in the country—"diluted the media's impact." *Skilling*, 130 S.Ct. at 2916. Second, the news stories regarding Enron mostly involved dry business and economics and did not present "the kind of vivid, unforgettable information" the Court has "recognized as particularly likely to produce prejudice." *Id.* Third, over four years had elapsed between Enron's bankruptcy and Skilling's trial. The absence of these safeguards for Mr. Ray highlights the need to move the place of trial.

Indeed, the Defense is aware of no Arizona case in which a change of venue motion has been denied in the presence of such pervasive, prejudicial publicity and such pellucidly clear questionnaire results as are present here. *Cf. State v. Chaney*, 141 Ariz. 295, 302 (1984) (denial of motion for change of venue was not an abuse of discretion where "[m]ost of the jurors who

knew some of the facts of this case had forgotten much of what they had read or heard," and "only six jurors"—all of whom were excused—"said they could not fairly judge this case"); *State v. Greenawalt*, 128 Ariz. 150, 163 (1981) ("only 41 potential jurors had to be called to obtain a panel of 34 ..., of which only four were excused by the court for the reason that they could not set aside a previously formed opinion"); *State v. Davolt*, 207 Ariz. 191, 206 (2004) (nine of the fourteen empaneled jurors "had some prior knowledge of the case," but the trial court struck "all prospective jurors who stated they had formed preconceived notions about the case or did not believe they could be fair and impartial"); *State v. Tison*, 129 Ariz. 546 (1981) (16 of 50 prospective jurors expressed opinion that defendant was guilty; all were excused); *State v. Murray*, 184 Ariz. 9 (1995) ("some prospective jurors had heard about the case"); *State v. Gretzler*, 126 Ariz. 60, 76 (1980) (initial motion to change place of trial granted; jury after venue change was not unfair because "[n]o one on the thirty-six member panel indicated a knowledge of the instant case").

2. It is more likely that a fair and impartial jury could be selected in Maricopa County.

The fact that some media coverage of the incident at Angel Valley Resort, and of Mr. Ray's trial, has extended beyond Yavapai County does not weigh against changing the place of trial.[2] Maricopa County presents a suitable alternative.

Maricopa County has a population of nearly 4,000,000—nearly 20 times the population of Yavapai County. Roughly 75% of the Maricopa population resides in the greater metropolitan area of Phoenix, the nation's fifth most populous city. The size and diversity of this alternate jury pool is a recognized factor favoring the likelihood of empaneling an impartial jury. *See Skilling*, 130 S.Ct. at 2915; *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991) (potential for prejudice mitigated by the size of the "metropolitan Washington [D.C.] statistical area, which has a

[2] Of course, trial by a fair and impartial jury is a defendant's constitutional right, and that right does not diminish when prejudice is widespread. If an impartial jury cannot be seated, the trial must be postponed until passions subside. *See Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *Delaney v. United States*, 199 F.2d 107, 115 (1st. Cir. 1952) ("[I]f assurance of a fair trial would necessitate that the trial of the case be postponed . . . , then we think the law required no less than that.").

population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1044 (1991) (plurality opinion) (reduced likelihood of prejudice where venire was drawn from a pool of over 600,000 individuals). Moreover, the effect of pretrial publicity—the critical factor in determining whether Due Process mandates a change of venue—is likely to be much less intense and tightly held in Maricopa than in Yavapai, the epicenter of the incident. Accordingly, Maricopa County constitutes a suitable alternative venue.

B. The trial judge is charged with the duty of protecting a defendant's right to an impartial jury.

"When pretrial publicity is at issue," our legal system places "'primary reliance on the judgment of the trial court.'" *Skilling*, 130 S.Ct. at 2918 (quoting *Mu'Min*, 500 U.S. at 427). Such reliance "makes [especially] good sense, because the judge 'sits in the locale where the publicity is said to have had its effect' and may base her evaluation on her 'own perception of the depth and extent of news stories that might influence a juror.'" *Id.; see McVeigh*, 918 F.Supp. at 1475 (transferring trial from Oklahoma City to Denver, Colorado to protect right to impartial jury, noting "*the court's obligation* to assure that the trial be conducted with fundamental fairness and with due regard for all constitutional requirements" (emphasis added)).

This Court must perform with great care its duty to protect the Defendant's right to an impartial jury. In so doing, the Court must be mindful that opinions of guilt, once formed, are rarely relinquished—and are at odds with the presumption of innocence and the requirement of proof beyond reasonable doubt. *See Irvin v. Dowd*, 366 U.S. 717, 727 (1961) ("The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."). The pivotal question, as both parties here agree, is whether the jurors can "lay aside [their] impression or opinion and render a verdict based on the evidence presented in court.'" *Chaney*, 141 Ariz. at 302 (quoting *Irvin*, 366 U.S. at 723). The answer here, evidenced by the resounding and alarming questionnaire results, is no. The Court should therefore grant Mr. Ray's renewed motion to change the place of trial.

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MUNGER, TOLLES & OLSON LLP
BRAD D. BRIAN
LUIS LI
TRUC T. DO
MIRIAM L. SEIFTER

THOMAS K. KELLY

By: _____

Attorneys for Defendant James Arthur Ray

Copy of the foregoing delivered this 1st day of ~~January~~ February, 2011, to:

Sheila Polk
Yavapai County Attorney
Prescott, Arizona 86301

by _____