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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **STATE'S RESPONSE TO DEFENDANT'S RENEWED MOTION TO CHANGE PLACE OF TRIAL PURSUANT ARIZ. R. CRIM. P. 10.3** **(The Honorable Warren Darrow)**

The State of Arizona, through undersigned counsel, requests this Court to deny the Defendant's Renewed Motion to Change Place of Trial Pursuant to Ariz. R. Crim. P. 10.3. This Response is further supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Legal Argument:

I. The law:

Rule 10.3(b), Ariz. R. Crim. P., pertaining to a change of venue for trial due to pretrial publicity, states:

> Whenever the grounds for change of place of trial are based on pretrial publicity, the moving party shall be required to prove that the dissemination of the prejudiced material will probably result in the party being deprived of a fair trial.

Prejudice to the defendant can be either presumed or actual. See *State v. Blakely,* 204 Ariz. 429, 434, 65 P.3d 77, 82 (2003). Presumed prejudice results when the publicity is "so

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extensive or outrageous that it permeated the proceedings or created a 'carnival-like atmosphere.'" *State v. Atwood,* 171 Ariz. 576, 631, 832 P.2d 593, 648 (1992); *see also State v. Bible,* 175 Ariz. 549, 563, 858 P.2d 1152, 1166 (1993) ("pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality"). "The adverse publicity must be so extensively pervasive and prejudicial that 'the court cannot give credibility to the jurors' attestations, during voir dire, that they could decide fairly.'" *State v. Davolt,* 207 Ariz. 191, 206, 84 P.3d 456, 471 (2004). The standard for presumed prejudice is high, and the Arizona Supreme Court has failed to presume prejudice when the publicity was "primarily factual and non-inflammatory or the publicity did not occur close in time to the trial." *Id.* (other citations omitted). In evaluating whether prejudice should be presumed, a trial court should consider not only the quantity of publicity but also whether it is factual, whether it is inflammatory in nature, its frequency and duration, and its proximity to trial. See *State v. Nordstrom,* 200 Ariz. 229, 239, 25 P.3d 717, 727 (2001).

Defendant has the "extremely heavy" burden to demonstrate that the pretrial publicity is presumptively prejudicial. *Bible, supra,* 175 Ariz. at 564, 858 P.2d at 1167 (citing *Coleman v. Kemp,* 778 F.2d 1487, 1537 (11th Cir. 1985)). Simply because a juror may have knowledge of the case does not mean that the juror is unable to set aside that knowledge in evaluating the evidence adduced at trial. *State v. Gretzler,* 126 Ariz. 60, 77, 612 P.2d 1023, 1040 (1980) ("Neither prior knowledge of the case nor an opinion concerning the defendant's guilt will disqualify a juror unless there is evidence that the juror is unable to set aside such knowledge or opinion in evaluating the evidence presented at trial."); *see also State v. Endreson,* 109 Ariz. 117, 506 P.2d 248 (1973) (half of the trial jury had knowledge of the case); *State v. Schmid,* 109 Ariz. 349, 509 P.2d 619 (1973) (all jurors had knowledge of the case).

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In the absence of presumed prejudice, a defendant must demonstrate that the pretrial publicity is actually prejudicial and will likely deprive him of fair trial. *State v. Davolt,* 207 Ariz. 191, 206, 84P.32 456, 471 (2004). To establish actual prejudice, a defendant must show the jurors have preconceived notions of his guilt and are unable to put those notions aside. *Id.* Prior knowledge of the case alone is not enough. *State v. Chaney,* 141 Ariz. 295, 302, 686 P.2d 1265, 1272 (1984). Change of venue will be granted only if the court finds the jurors cannot lay aside their preconceived notions and render a verdict based on the evidence presented at trial. *Id.* As recently noted by the United States Supreme Court, "Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*." *Skilling v. United States,* 130 S.Ct. 2896, 177 L.Ed. 2d 619 (2010).

I. Defendant misrepresents the nature of the media coverage in this case.

Defendant continues to misrepresent and mischaracterize both the extent and the nature of the publicity in the local area. Using phrases like "sensational and unflattering" and a "drumbeat of inflammatory and inaccurate" media coverage, Defendant would have this Court believe that the media not only continued to focus on this case, but has done so in an inaccurate and inflammatory manner. An actual review of media coverage supports a contrary conclusion. For example at the time Defendant filed his previous motion in July 2010, a search of the Prescott Daily Courier articles indicated they had published 33 articles relating to this case. The same search run on February 4, 2011 reveals a total of 35 articles.[1] Such coverage, a total of three additional articles over a six month period, hardly constitutes a "drumbeat." Nor are the articles in any way inflammatory. Instead they simply report on the pleadings filed and the rulings made by the Court. Samples of recent articles from *The Daily Courier*, *The Red Rock*

[1] Although the search returned 38 articles, three of the articles did not cover this case.

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News and *The Arizona Republic* are attached as Exhibit A to this Response. This is hardly the "huge ... wave of public passion" described by the Court in *Irvin v. Dowd,* 366 U.S, 717, 727, 81 S.Ct. 1639 (1961) and quoted by Defendant.

Notwithstanding Defendant's mischaracterization of the media coverage, the State agrees that the jury questionnaires indicate the majority of the potential jurors have heard about the case. The State also agrees that many of the jurors have indicated they have formed opinions regarding Defendant's guilt. However, these facts alone do not merit moving the trial out of Yavapai County.

II. Defendant's survey does not provide an accurate representation of potential jurors in Maricopa County.

In support of his Motion to move the trial to Phoenix, Defendant has provided this Court with an Affidavit of Dr. Norma Silverstein which details the result of a telephonic survey of 400 residents of Maricopa County. Defendant insists this survey proves overwhelming bias exists in Yavapai County and that similar bias does not exist in Maricopa County. In order to reach the 400 individuals who agreed to be interviewed, 17,358 calls were made. Of the calls that actually connected, 230 individuals refused to participate and 29 individuals terminated the interview before it was complete. Moreover, in instances where a participant indicated bias, they were not then required to explain the nature or the extent of the bias. The State would submit that an anonymous 2 minute, 11 second[2] telephonic survey will elicit far different responses than those provided by a potential juror who has been served with a summons for a three to four month trial and who must sign an oath attesting to the truthfulness of his response.

The State does not contest Defendant's assertion that Maricopa County has a much larger population than Yavapai County. Given this fact, it does not require a doctor to support a

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conclusion that there will be fewer individuals percentage-wise who have direct knowledge of the facts of this Yavapai County case. However, widespread knowledge of a case - and even widespread pre-formed opinions of guilt - do not automatically require a change of venue. If it did, every high profile case in a rural Arizona county would have to be transferred to Maricopa or Pima County. Such a conclusion is contradicted by case law addressing a defendant's request for change of venue. As the Supreme Court noted in *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639 (1961):

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. ***To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.*** It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 722-23, 81 S.Ct. at 1642-43 (citing *Spies v. People of State of Illinois*, 123 U.S. 131, 8 S.Ct. 22, 31 L.Ed. 80; *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021; *Reynolds v. United States*, 98 U.S. 145, 155 25 L.Ed 244.) (emphasis added).

In the instant case, over half of the juror questionnaires have indicated they can be fair and impartial.[3] In fact many of the jurors have explicitly commented regarding their ability to judge the case only on the facts. For example, Juror 295685 stated, "I don't make decisions based on what I read or hear in media. I believe a person is innocent until proven guilty beyond a reasonable doubt." Similarly, Juror 292040 stated, "I believe every citizen is entitled to a fair trial

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[2] This is the average length of the interview. See Defendant's Exhibit F.
[3] Of the 263 questionnaires received by the State by February 4, 2011, 155 (59%) indicated they could be fair and impartial.

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and is innocent until proven guilty." At this point **none** of the potential jurors have been asked if they can "lay aside his impression or opinion and render a verdict based on the evidence presented in court." It is the response to this question that is critical in determining whether a fair and impartial jury can be found in Yavapai County. The State is confident that it can.

III. The size of Yavapai County does not necessitate a change of venue.

Defendant is not just seeking a change of venue; he is specifically seeking a change of venue to Phoenix. In support of this claim, he insists the small population of Yavapai County makes it impossible to assemble a fair and impartial jury. Yavapai County has a population of approximately 215,000. In his motion, Defendant cites to *Mu'Min v. Virginia,* 500 U.S. 415, 429 (1991), and writes that it is a case wherein the Supreme Court found "the potential for prejudice mitigated by the size of the 'metropolitan Washington [D.C] statistical area, which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year." In fact, a review of the Court's opinion in *Mu'Min v. Virginia* indicates the defendant was tried in Prince William County, which had a population in 1988 of 182,537. *Id.* at 429. In finding no support for Mu'Min's claim of prejudice due to pretrial publicity, the Supreme Court was contrasting the population of Prince William County to the population of 30,000 in Gibson County, Indiana, which was a factor in its holding in *Irvin v. Dowd,* 366 U.S. 717, 719, 81 S.Ct. 1639, 1641 (1961).

In *Irvin v. Dowd,* the pretrial publicity was so extensive and inflammatory that 90 percent of jurors examined "entertained some opinion as to guilt – ranging in intensity from mere suspicion to absolute certainty." *Id.* at 727. Moreover, eight of the 12 jurors ultimately seated believed the defendant was guilty. The extremes, which the Court found could not be overcome through proper voir dire in *Irvin,* are simply not present in the instant case.

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Defendant asserts he 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." However, a review of Arizona cases indicates requests for change of venue are rarely granted even in cases of extremely unfavorable pretrial publicity. In *State v. Bible,* 175 Ariz. 549, 858 P.2d 1126 (1993), the Defendant was an ex-convict, who kidnapped, raped and brutally murdered a nine-year-old girl in Flagstaff. There was pervasive pretrial publicity. From January 1989 to the beginning of trial, a time period of fourteen months, 130 news items appeared. *Id.* at 563-564, 858 P.2d at 1166-1167. While the majority of the news items were described as "factually based," some were inaccurate, discussed inadmissible evidence and even described the defendant as a "'convicted 'child molester' who committed 'child rape.'" *Id.* at 564, 858 P.2d at 1167. "Because of the extensive pretrial publicity and the size of Flagstaff and Coconino County (respective populations of approximately 45,000 and 100,000), nearly all of the potential jurors had some knowledge of the case." *Id.* at 563, 858 P.2d at 1166. Of the 187 written questionnaires completed by potential jurors, almost all had read or heard about the case and approximately one-half had an opinion about Defendant's guilt. *Id.* Nonetheless, the Court found Defendant had failed to show actual prejudice and stated:

> Although almost all of the potential jurors had heard something about the case, the relevant inquiry is the effect of publicity on a juror's objectivity, not the mere fact of publicity. After the court excused 111 potential jurors, less than twenty-five percent of the sixty-one member venire left had a *qualified* opinion regarding guilt and only two such individuals served on the trial jury, *no* member had an unqualified opinion, and *all* indicated that they could set aside their qualified opinions and decide the case based on evidence produced at trial. These responses undercut Defendant's prejudice claim.

Id. at 566, 858 P.2d at 1169 (internal citations omitted.)

In *State v. Cruz,* 218 Ariz. 149, 181 P.3d 196 (2008), the defendant moved for a change of venue based on a pretrial poll of 100 potential Pima County jurors. Seventy-nine percent of those

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polled had heard of the case and of that group, fifty-one percent thought Defendant was guilty. *Id.* at 204, 181 P.3d at 204. Despite the poll results, the Court found the defendant had failed to show actual prejudice. Noting that the "relevant inquiry for actual prejudice is the effect of the publicity on the objectivity of the jurors actually seated," the Court found the extensive voir dire of the jury pool had served to "weed out potentially biased jurors." *Id.*

Other courts have made similar findings in cases involving extensive pretrial publicity. In fact, the State can find no Arizona case where denial of a change of venue due to pretrial publicity was found to be error. See *State v. Jones,* 197 Ariz 290, 307, 4 P.3d 345, 362 (2000) (No actual prejudice when every juror who admitted he could not set aside his feeling concerning the media coverage eventually was excused); *State v. Tison,* 129 Ariz. 546, 633 P.2d 355 (1981) (No actual prejudice where every member of the jury panel had some knowledge of the case and 16 of 50 prospective jurors acknowledged that they were prejudice against the defendant.); *State v. Murray,* 184 Ariz. 9, 26, 906 P.2d 542, 559 (1995) (No actual prejudice where "only those prospective jurors who indicated they could set aside the publicity and decide the case on the evidence presented remained on the jury panel.").

The State continues to believe that through voir dire, a fair and impartial jury will be found. "'An examination of the jurors, through voir dire process, is an effective means by which to determine the effects or influence of pretrial publicity on the jurors.'" *State v. Blakely,* 204 Ariz. 429, 434, 65 P.3d 77, 82 (2003) (quoting *State v. Greenawalt,* 128 Ariz. 150, 163, 624 P.2d 828, 841 (1981). As a result of the questionnaire, potential jurors with preconceived notions regarding Defendant's guilt or innocence have been identified. After eliminating the jurors who have demonstrated a significant hardship, the remaining jurors will be questioned by Court and counsel pursuant to Rule 18.5(d), Ariz. R. Crim. P., regarding their ability to be fair

and impartial. After attempts to rehabilitate through oral questioning pursuant to Rule 18.5(d), Ariz. R. Crim. P., any prospective juror who still indicates he cannot be fair and impartial should be stricken for cause.

In *Skilling v. United States,* 130 S.Ct. 2896, 2919, 177 L.Ed. 2d 619 (2010), the United States Supreme Court characterized the jury questionnaire as a "springboard for further questions put to the remaining members of the array," and voir dire as the "culmination of a lengthy process." *Id.* This same process is now underway in the instant case and will result in a fair and impartial jury. Defendant's Motion, based on nothing more than written juror questionnaires, seeks to cut short the jury selection process without benefit of oral questioning by Court and counsel. Defendant's motion should be denied.

RESPECTFULLY submitted this 9th day of February, 2011.

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The Daily Courier

Thursday, February 03, 2011

Defense in sweat lodge case wants trial moved

The Associated Press

Thursday, February 03, 2011

CAMP VERDE - Attorneys representing a self-help guru charged with manslaughter have renewed a request to have the case moved out of Yavapai County.

James Arthur Ray's attorneys say continued media coverage means that their client won't get a fair trial. They want the case heard in the Phoenix area.

Superior Court Judge Warren Darrow rejected an initial request for a change of venue but said it could be reconsidered closer to the trial date.

Ray has pleaded not guilty to three counts of manslaughter stemming from the deaths of three people following a 2009 sweat lodge ceremony he led near Sedona.

His attorneys say jury questionnaires reveal widespread prejudice against Ray in Yavapai County.

The trial begins Feb. 16.

Related Links:

Exhibit A
Sample Articles

PRINT

Ray defense wants web videos banned

Written by Mark Lineberger

Friday, 07 January 2011 00.00

Attorneys representing self-help author and motivational speaker James Arthur Ray are asking a Yavapai County Superior Court judge to suppress from evidence videos recorded by Ray and posted to the website YouTube.com.

Ray faces three charges of manslaughter stemming from deaths that took place at a special sweat lodge ceremony at Angel Valley Retreat Center near Sedona in October 2009, which was part of a $10,000-a-head event.

Lizbeth Neuman, 49, of Michigan, Kirby Brown, 38, of New York, and James Shore, 40, of Wisconsin, died after exposure to conditions inside the sweat lodge.

Ray turned himself in to the Yavapai County Sheriff's Office in Prescott last February.

In documents filed by attorneys for the prosecution, the state disclosed it would possibly admit the online videos recorded by Ray as evidence.

In a request filed by Ray's defense team late last month, his lawyers argue the videos were prepared after the October 2009 incident and have no relevance on the sweat lodge incident or on Ray's trial, scheduled to begin in February.

James Arthur Ray faces three charges of manslaughter stemming from deaths that took place at a special sweat lodge ceremony at Angel Valley Retreat Center near Sedona in October 2009, which was part of a $10,000-a-head event.

The defense argues the videos are of Ray discussing self-help topics, such as "How to Flow Through Life's Challenges," and are unrelated.

Instead, the defense claims the prosecution wants to show the recordings to the jury in order to make Ray look bad.

"[The recordings] are only being offered to prejudice [the] defendant in front of the jury by showing defendant remains engaged in self-help tutorials despite the allegations of wrongdoing alleged in the indictment," states the request, signed by defense attorney Thomas Kelly. "Under such circumstances the video tapes should be suppressed."

The defense goes on to argue the recordings would only be used by the state to back an argument Ray is "still a danger" or "has not learned his lesson" or something similar.

"Such a purpose is simply designed to inflame the passions of the jury and has no relevance to the charged crimes," the request reads.

The defense also want to keep testimony or interviews conducted by the state in which the people answering gave an opinion as to Ray's guilt or innocence. Ray's attorneys are also seeking to keep the state from having witnesses give "victim impact statements" before the jury, that is, witnesses describing the emotional impact the deaths of the alleged victims had on their lives.

"Mr. Ray is on trial for manslaughter based on the theory he recklessly caused the deaths of three alleged victims," reads a motion filed Dec. 27. "The jury should decide the case based on evidence, not sympathy for the victims or their family and friends."

The motion cites a 1988 case before the Texas Court of Appeals where testimony about the emotional impact of a rape was excluded as irrelevant.

"The introduction of victim-impact testimony would additionally violate Mr. Ray's rights to due process and a fair trial under the United States and Arizona constitutions," the motion continues. "Mr. Ray has a right to be tried before an unbiased jury solely on evidence relating to the issue of innocence or guilt of the charged crime."

The trial is set to begin Wednesday, Feb. 16.

Yavapai County Superior Court Judge Warren Darrow has set aside 65 days for the proceedings, three to four days a week from mid-February through mid-June, if necessary.

Ray has been excused from attending hearings in Camp Verde until his trial begins, unless his presence is demonstrated to be absolutely necessary.

Sweat-lodge guru's lawyers want to block witnesses

*by **Glen Creno** - Jan. 27, 2011 12 00 AM*
The Arizona Republic

Lawyers for the man who led a fatal sweat-lodge ceremony near Sedona are trying to keep a couple of the prosecution's proposed expert witnesses from testifying in his upcoming trial.

One of those experts is Rick Ross, who has a national reputation as an authority on cults and cult behavior. Ross, formerly based in Arizona, has a controversial background, including his work as a cult "deprogrammer."

Yavapai County prosecutors want Ross to testify in their case against James Arthur Ray, who is facing three manslaughter charges stemming from the 2009 sweat-lodge ceremony. They want Ross to testify about a mind-control technique that they say convinced people to stay inside the sweltering enclosure, overriding "common sense or wisdom" that told them to get out when they got too hot.

The sweat lodge was part of Ray's Spiritual Warrior event on Oct. 8, 2009, at a retreat center west of Sedona. Three of the more than 50 participants died - two shortly afterward and another more than a week later. About 20 people were taken to hospitals suffering various heat-related symptoms.

Ray's lawyers also object to the prosecution's plans to get testimony from Steven Pace, an expert on managing risk in adventure-education programs. Prosecutors want him to evaluate the safety of Spiritual

Warrior's programs, including the sweat lodge.

Ray's lawyers say the trial is about Ray's

behavior, not corporate standards, and that arguing about it would unfairly distract the jury.

Ray's lawyers say Ross can't argue that Ray exerted some sort of unusual control over the people in the sweat lodge. They say participants could leave at any time, that some did so and some returned.

Ross' status as a cult expert also came under question by Ray's attorneys, who said he has no education beyond a high-school degree and no special training in counseling or mental-health issues.

Prosecutors say Ross hasn't been involved in the "forcible detention and deprogramming" of adult cult members since 1990 and that his past shouldn't be mentioned in the trial. They said Ross has testified in courts in several states and has written about cults and coercive techniques.

Prosecutors said they couldn't comment beyond their filings due to legal and ethical