

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	JUN - 3 2019 COURT USE ONLY
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. JAMES HOLMES, Defendant	σ COURT USE ONLY σ Case No. 12CR1522
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	REDACTED Division 26
NOTICE OF INTENT TO MOVE FOR CHANGE OF VENUE [D-112]	

CERTIFICATE OF CONFERRAL

Conferral is not appropriate for this pleading.

Mr. Holmes, through counsel, hereby provides notice to this Court and the prosecution that he will move for a change of venue pursuant to Crim. P. 21 and C.R.S. §16-6-101 *et seq.*, and the state and federal constitutional guarantees to a fair and impartial jury and to a fair trial. As grounds for this notice, he states the following:

1. Mr. Holmes has a right to a fair trial by an impartial jury. Colo. Const. Art. II, §§ 16, 23; U.S. Const., Amends. VI, XIV; *see also Duncan v. Louisiana*, 391 U.S. 145 (1968); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 377 U.S. 723 (1963); *Fields v. People*, 732 P.2d 1145 (Colo. 1987).

2. A court should grant a request to change venue whenever there is “a reasonable likelihood” that the accused will not receive a fair trial by impartial jury in the venue in which the case arose. *E.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Wafai v. People*, 750 P.2d 37, 43 (Colo. 1988).

3. Crim. P. 21 and C.R.S. §§ 16-6-101--102 provide that a change of venue should be granted when a fair trial cannot be obtained in the location where the trial is pending. Under the Sixth and Fourteenth Amendments, and Colo. Const. Art. II, §§ 16, 23, the risk that a fair trial cannot take place requires corrective action by the trial court.

4. The legal standard which this Court must use in deciding to change venue is set forth in numerous cases. *See, e.g., Wafai v. People*, 750 P.2d 37, 43 (Colo. 1988):

As the Court stated in *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961), “[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors. The failure to accord an accused a fair hearing violates even the minimum standards of due process.” In *Sheppard v. Maxwell*, [384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)] the Court stressed that due process requires a trial by an impartial jury, and stated that:

the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity.

384 U.S. at 362-63, 86 S.Ct. at 1552.

5. In ruling on a motion for change of venue, a trial court should not confuse the above standard with the more stringent standard applied by appellate courts in deciding whether a trial court’s ruling on a motion for change of venue must be reversed. Because of the different role and responsibilities of the appellate and trial courts, this Court is legally bound to change venue in circumstances where on appeal “reversible error” may not necessarily be found. The difference between the standard of appellate review and the standard to be applied in the trial courts for ruling on change of venue was acknowledged by the Colorado Supreme Court in *People v. Harlan*, 8 P.3d 448 (Colo. 2000). In *Harlan*, which was also a capital case, the Colorado Supreme Court affirmed the trial court’s denial of defendant’s motion for change of venue, applying an abuse of discretion standard of appellate review. However, the Colorado Supreme Court expressly noted that, had the members of that court sat as the trial judge, they might very well have granted a change of venue. *See id.* at 668 (“We hold that the defendant was not deprived of a fundamentally fair trial even though we, were we the in trial court’s place, may have decided that a change of venue was merited. The basis for our holding is that the trial court acted within its discretion in denying the motion.”).

6. While a new trial should be ordered where publicity occurs during the proceedings that threatens the fairness of a trial, “we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.” *Sheppard*, 384 U.S. at 363.

7. The *risk* of an unfair trial is the driving force behind the rules governing the protection of the right to fair trial by impartial jury. Where such a risk exists, the trial court should act to avoid it. Every accused is entitled to a trial free of prejudice inherent in circumstances which present an “unacceptable risk ... of impermissible factors coming into play.” *Estelle v. Williams*, 425 U.S. 501, 505 (1976) (making indigent accused appear before jury in jail clothes violates right to fair trial by impartial jury.)

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness [T]o perform its high function in the best way ‘justice must satisfy the appearance of justice.’ *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Estes v. Texas, 381 U.S. 532, 543 (1965), quoting *In re Murchinson*, 349 U.S. 133, 136 (1955). See also *Turner v. Louisiana*, 379 U.S. 466 (1965); *Beeman v. People*, 565 P.2d 1340 (Colo. 1977).

8. In determining the effect of pretrial publicity on the jury panel, “a juror’s assurance that he can lay aside his impression or opinion of partiality is not dispositive of a defendant’s claim that he was denied his constitutional right to a fair trial. Even on appeal where the standard of review is highly deferential to the trial court, where a defendant demonstrates the existence of a pattern of deep and bitter prejudice throughout the community where he is to be tried, a juror’s assurance that he will be fair and impartial is not conclusive.” *People v. Botham*, 629 P.2d 589 (Colo. 1981). Thus simply because sitting jurors may be able to say to the court that they will check what they have heard at the courtroom door does not of itself assure the accused his constitutional right to a fair and impartial jury under the state and federal constitutions.

9. This Court should exercise its discretion and change venue to protect Mr. Holmes’ right to a fair trial and, if necessary, a fair jury sentencing proceeding. A change of venue would result in a more expeditious and fair trial in this capital proceeding, a proceeding that requires enhanced reliability under the Eighth Amendment and the State’s constitutional counterpart. See, e.g., *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980); *People v. Young*, 814 P.2d 834, 843, 847 (Colo. 1991) (the death penalty mandates an enhanced level of certainty and reliability in the jury’s decision to impose that penalty); *People v. Tenneson*, 788 P.2d 786, 791-792 (Colo. 1990) (“Death is a punishment qualitatively different from any other. Because of the unique severity and finality of a sentence to death, the United States Supreme Court has emphasized the heightened need for sentencing reliability in capital cases.”) (multiple citations omitted); see also Colo. Const. art. II, §§ 20 & 25.

10. This Court set the deadline for filing non-capital motions on June 3, 2013. This Court has also set motions hearings for the non-capital motions for the month of August.

11. A defendant must show one of the following to be entitled to a change of venue:

- a. The existence of massive, pervasive, and prejudicial publicity that creates a presumption that he will be denied a fair trial; *Harlan*, 8 P.3d at 468-9 (citing *People v. Botham*, 629 P.2d 589, 597 (Colo. 1981) (citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Walker v. People*, 458 P.2d 238 (Colo. 1969)); or
- b. A nexus between extensive pretrial publicity and the particular jury panel that creates an actual prejudice against him. *Harlan*, 8 P.3d at 468-9 (citing *People v. Botham*, 629 P.2d 589, 597 (Colo. 1981) (citing *Murphy v. Florida*, 421 U.S. 794

(1975); *Irvin v. Dowd*, 366 U.S. 717 (1961); *People v. McCrary*, 549 P.2d 1320 (1976); *Sergent v. People*, 497 P.2d 983 (1972); *Small v. People*, 479 P.2d 386 (1970); ABA Standards for Criminal Justice, 8-3.3 (2d ed. 1980)).

12. In order to determine whether pretrial publicity creates a presumption that Mr. Holmes will be denied a fair trial, this Court must be able to review the totality of the publicity on the case from the outset of the case to the time right up until trial.

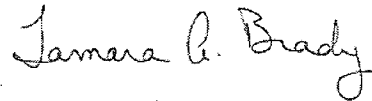
13. While a motion for change of venue is technically a non-capital motion, the issues surrounding a change of venue are more appropriately litigated closer to trial. In fact, one of the determinative factors in a change of venue motion is the proximity of the news coverage to the time of trial. *People v. Harlan*, 8 P.3d 448, 469 (Colo. 2000).

14. Mr. Holmes thus provides notice that he will move this Court for a change of venue before trial. Mr. Holmes also provides notice that he will file additional legal argument, supporting affidavits and exhibits, and testimony to support this motion.

Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



Daniel King (No. 26129)
Chief Trial Deputy State Public Defender



Tamara A. Brady (No. 20728)
Chief Trial Deputy State Public Defender



Kristen M. Nelson (No. 44247)
Deputy State Public Defender

Dated: June 3, 2013

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Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

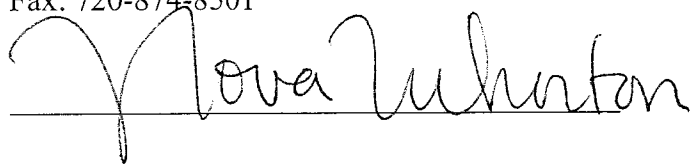
JUDGE Dated

I hereby certify that on June 3rd, 2013, I

mailed, via the United States Mail,
 faxed, or
 hand-delivered

a true and correct copy of the above and foregoing document to:

George Brauchler
Jacob Edson
Rich Orman
Karen Pearson
Office of the District Attorney
6450 S. Revere Parkway
Centennial, Colorado 80111
Fax: 720-874-8501



Nova Johnston