

Venue Transfer [2012]

Mr. Client requests that this Court transfer the trial to a venue within the Central District of California pursuant to Federal Rule of Criminal Procedure 21(a) ("Rule 21(a)"), the Fifth and Sixth Amendments to the Constitution, and the Court's supervisory powers.

I.

THE CONSTITUTION AND RULE 21(a) MANDATE A TRANSFER

[insert facts justifying transfer]

A. **The Constitution And Rule 21(a) Require A Transfer Where Pretrial Publicity Negates An Individual's Ability To Receive A Fair and Impartial Trial.**

According to Rule 21(a) and the Fifth and Sixth Amendments, a case should be transferred where external factors, such as pervasive pretrial publicity, negate an individual's right to a fair trial. Rule 21(a) requires the Court to order a change of venue where, as here, "so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Fed. R. Crim. P. 21(a). "Rule 21(a)'s requirement that a defendant receive a 'fair and impartial trial' mirrors the dictates of the due process clause[.]" *United States v. Rewald*, 889 F.2d 836, 862 n.27 (9th Cir. 1989). And under that clause, as well as the Sixth Amendment's right to a fair and impartial jury, a Court "should" transfer when "there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial[.]" *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *see also Groppi v. Wisconsin*, 400 U.S. 505, 510 (1971) ("On at least one occasion this Court has explicitly held that only a change of venue was constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Fourteenth Amendment."); *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988) ("due process requires that the trial court grant defendant's motion for change of venue" when "unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere.").

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Under both the Constitution and Rule 21(a), “[w]hen a trial court is ‘unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere[,] . . . due process requires that the trial court grant defendant’s motion for a change of venue.’” *Hayes v. Ayers*, 632 F.3d 500, 507-08 (9th Cir. 2011) (quoting *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988)); see *Skilling v. United States*, 130 S. Ct. 2896, 2913 (2010) (noting that our judicial system requires that verdicts be reached “only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print”) (citation omitted). Before a trial, an individual may be entitled to a presumption of prejudice if the district where the trial is to occur is saturated with media coverage that manifestly taints the criminal prosecution. See, e.g., *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

While a “presumption of prejudice . . . attends only the extreme case[,]” it may be appropriate where the size of the community and potential jury pool is small, the media coverage contains “confession[s] or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight[,]” and the trial follows shortly after the media coverage. *Skilling*, 130 S.Ct. at 2915-16. Other relevant considerations include “whether the news accounts were primarily factual because such accounts tend to be less inflammatory than editorials or cartoons;” *Daniels v. Woodford*, 428 F.3d 1181, 1211 (9th Cir. 2005); whether the media accounts include repetition of the accused's past criminal record, see *id.* at 1212; whether publicity will continue through trial, see *Patton v. Yount*, 467 U.S. 1025, 1032-33 (1984); and whether the publicity contains prejudicial remarks by public officials or attacks on the accused that tend to inflame the public, see *Sheppard*, 384 U.S. at 357-58.

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B. A Presumption Of Prejudice Exists And Requires A Venue Change In This Case.

Here, consideration of the factors set forth above argues forcefully for a venue change.

1. Inflammatory news accounts/defendant's confession publicized

[insert facts]

2. Repetition of alleged criminal record and personal history

[insert facts]

3. Conjecture about a possible motive

[insert facts]

4. Continuance of publicity through trial

Given the intense media scrutiny applied to Mr. CLIENT's case thus far, it is highly likely that media attention will continue through trial.

5. Short time elapsed between crime and trial

6. Small, tight-knit community

II.

THIS COURT SHOULD ORDER THE CASE TRANSFERRED PURSUANT TO ITS SUPERVISORY POWERS

This Court should also order a venue transfer pursuant to its supervisory powers. In *Marshall v. United States*, the Supreme Court recognized that trial courts have wide discretion in the exercise of their supervisory powers to address prejudice resulting from trial publicity. *See* 360 U.S. 310, 312 (1959) (per curiam). These supervisory powers provide "broader protection against prejudice than the constitutional standard," *United States v. Haldeman*, 559 F.2d 31, 146 (D.C. Cir. 1976) (MacKinnon, J., concurring in part and dissenting in part), and permit a new trial

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on facts that do not amount to a due process violation. *See United States v. Blom*, 242 F.3d 799, 803 (8th Cir. 2001). Thus, the standard for determining whether a transfer is appropriate under a court's supervisory powers is less stringent than under the Constitutional standard discussed above. Indeed, courts have exercised their supervisory powers to order pre-trial venue transfers. *See, e.g. Skilling*, 130 S. Ct. at 2953 n.9 (Sotomayor, J., concurring in part) (noting that supervisory power confers "more latitude" on district courts to transfer venue in instances where due process may not require it, and recognizing it may be prudent for a district court to exercise this discretion even where a defendant does not demonstrate a Constitutional basis for venue transfer); *United States v. Tokars*, 839 F. Supp. 1578, 1584 (N.D. Ga. 1993) (finding that while facts created a "close question" under constitutional test, the decision to order a transfer based on the court's supervisory powers was "not a close one"); *United States v. Moody*, 762 F. Supp. 1485, 1486 (N.D. Ga. 1991).

The court's broad discretion to exercise its supervisory powers permits the court to consider factors in addition to those that require a venue change under Rule 21(a) and the Constitution. For example, the court may consider that it is more efficient to transfer the case before voir dire begins than to wait for voir dire to reveal juror prejudice. *See Tokars*, 839 F. Supp. at 1584 (finding transfer under supervisory powers appropriate based on inconvenience of an unsuccessful voir dire). The court may also consider that a transfer to the Central District of California will not inconvenience the parties or witnesses. *Id.* (transferring case to a district within 150 miles that contained adequate facilities, a similar jury pool, and a similar population.) There are multiple other districts in California with adequate facilities, including the Central district with its closest courthouse located less than 100 miles from San Diego, and a population and jury pool similar—though larger and more diverse—to that of San Diego. A transfer to another district before voir dire is an appropriate and efficient exercise of this Court's supervisory powers.