

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 36752

FILED

APR 02 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

PETITION FOR REHEARING

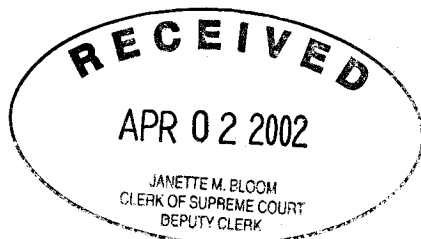
Comes now Appellant, ZANE MICHAEL FLOYD, by and through his attorney, ROBERT L. MILLER, Deputy Public Defender, Clark County Public Defender's Office, and pursuant to NRAP 40, petitions this Court for a rehearing on the Opinion filed in the present matter (118 Nev.Adv.Op. 17, filed March 13, 2002).

This Petition is based upon the Memorandum of Points and Authorities attached hereto.

Dated this 28<sup>th</sup> day of March, 2002.

MARCUS D. COOPER  
CLARK COUNTY PUBLIC DEFENDER

By *[Signature]*  
ROBERT L. MILLER  
NEVADA BAR #1060  
DEPUTY PUBLIC DEFENDER  
309 SOUTH THIRD STREET, #226  
LAS VEGAS, NEVADA 89155-2610  
(702) 455-4685



02-05846

1 POINTS AND AUTHORITIES

2 NRAP 40 (c)(2) provides, in relevant part, that this Court  
3 may consider rehearings in the following circumstances:

4 (1) When the court has overlooked or  
5 misapprehended a material fact in the record or  
6 a material question of law in the case,

7 Rehearing should be granted on the present appeal inasmuch  
8 as the Court overlooked a material question of law applicable to  
9 Issue II of Appellant's direct appeal: That the trial court  
10 committed constitutional error in denying Defendant's motion for a  
11 change of venue.

12 This Court upheld the district court's denial of  
13 Defendant's pre-trial motion for change of venue. In so holding,  
14 the Court overlooked a material question of law; specifically,  
15 whether Defendant had demonstrated that the community where the  
16 trial was held was saturated with prejudicial and inflammatory media  
17 publicity about the crime such that prejudice should have been  
18 presumed, and the motion for change of venue granted.

19 Prejudicial publicity sufficient to warrant granting of a  
20 motion for change of venue, may either be actual or presumed  
21 prejudice. Gallego v. McDaniel, 124 F.3d 1065, 1070 (9<sup>th</sup> Cir. 1997).  
22 In the case at bar, the Court's Opinion focuses entirely upon the  
23 standard of "actual prejudice," to the exclusion of any apparent  
24 consideration of "presumed prejudice." This focus is evident in the  
25 following Opinion excerpts:

26 "The State does not dispute that the media  
27 coverage of the case was massive. It simply  
28 points out that Floyd presents no evidence that

1 this coverage resulted in bias on the part of  
2 any juror." Floyd v. State, 118 Nev.Adv.Op. 17,  
3 p. 7.

4 "A defendant seeking to change venue must not  
5 only present evidence of inflammatory pretrial  
6 publicity but must demonstrate actual bias on  
7 the part of the jury empaneled." Id.

8 and

9 "Floyd does not point to evidence that any  
10 empaneled juror was biased...." Id.

11 The Court's Opinion leaves the impression that the actual  
12 bias standard is the only standard applicable to a change of venue  
13 request. The Court cites Sooner v. State, 112 Nev. 1328, 930 P.2d  
14 707, 712 (1996), modified on rehearing on other grounds, 114 Nev.  
15 321, 955 P.2d 673 (1998), as authority for the requirement that  
16 actual bias be proven. 118 Nev.Adv.Op. 17, p. 7.

17 Such a reading of the Sooner holding is unduly limited.  
18 In Sooner, the Ninth Circuit recognizes the existence of the  
19 presumed prejudice standard. While stating that "the presumed  
20 prejudice standard is rarely applicable" (112 Nev. at 1336), the  
21 Sooner Court nevertheless cited the case of Rideau v. Louisiana, 373  
22 U.S. 723 (1963), in which the United States Supreme Court found it  
23 appropriate to presume such prejudice based upon pretrial publicity.  
24 The Sooner Court also noted that there were additional cases,  
25 although few in number, in which relief had been granted on the  
26 basis of presumed prejudice. 112 Nev. at 1336, citing Coleman v.  
27 Kemp, 778 F.2d 1487, 1490 (11<sup>th</sup> Cir. 1985).

28 . . .

1 Based on these authorities, it is clear that the presumed  
2 prejudice standard remains a viable standard for evaluating change  
3 of venue requests based upon prejudicial publicity. The Court's  
4 Opinion in the case at bar fails to even acknowledge the existence  
5 of this standard. In ruling on the change of venue issue, it would  
6 appear that the Court overlooked this alternate basis; in spite of  
7 the fact that the existence of presumed prejudice was specifically  
8 argued in both Appellant's Opening Brief<sup>1</sup> and Reply Brief<sup>2</sup>. Based  
9 upon the Court's failure to apply a relevant standard of review to  
10  
11  
12  
13  
14  
15

16  
17 <sup>1</sup>Appellant's Opening Brief reads:

18 As a matter of constitutional law, it is well settled that the accused is  
19 entitled to a change of venue if he produces evidence of "inflammatory,  
20 prejudicial pretrial publicity that so pervades or saturates the  
21 community as to render virtually impossible a fair trial by an impartial  
22 jury drawn from that community, [since jury] *'prejudice is [then]  
presumed and there is no further duty to establish bias.'*" Coleman  
v. Zant, 708 F.2d 541, 544 (11<sup>th</sup> Cir. 1983)(quoting Mayola v.  
Alabama, 623 F.2d 992, 997 (5<sup>th</sup> cir. 1980), cert. denied, 451 U.S.  
913 (1981), emphasis added).

23 Appellant's Opening Brief, p. 24.

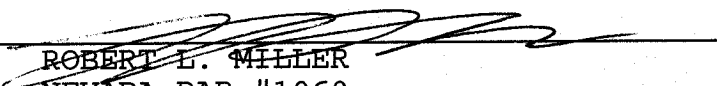
24 <sup>2</sup>Appellant's Reply Brief includes the following quotation from Gallego v. McDaniel, 124  
25 F.3d at 1070, a Ninth Circuit review of a Nevada case:

26 A defendant need only demonstrate one of two different types of  
27 prejudice in support of a motion to transfer venue: presumed or actual.  
Prejudice is presumed when the record demonstrates that the  
community where the trial was held was saturated with prejudicial and  
inflammatory media publicity about the crime.

28 Appellant's Reply Brief, p. 7.

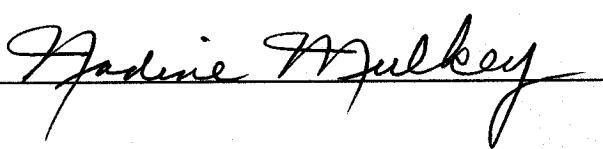
1 the change of venue issue, the present petition for rehearing must  
2 be granted.

3 MARCUS D. COOPER  
4 CLARK COUNTY PUBLIC DEFENDER

5  
6 By   
7 ROBERT L. MILLER  
8 NEVADA BAR #1060  
9 DEPUTY PUBLIC DEFENDER  
10 309 SOUTH THIRD STREET, #226  
11 LAS VEGAS, NEVADA 89155-2610  
12 (702) 455-4685  
13  
14  
15  
16  
17  
18  
19  
20

21 RECEIPT OF A COPY of the foregoing Petition for Rehearing  
22 is hereby acknowledged this 28<sup>th</sup> day of March, 2002.

23 STEWART L. BELL  
24 CLARK COUNTY DISTRICT ATTORNEY

25  
26 By   
27  
28