

1 The Warden is mistaken on two fronts. First, the Court has not overlooked *Strickland* prejudice
2 by ordering an evidentiary hearing. Rather the determination of whether there is presumed prejudice
3 occasioned by pretrial publicity will inform *Strickland* prejudice. Second, the Warden is focused on the
4 incorrect stage of the proceedings for determining whether there would be a different outcome in the
5 proceedings.

6 The issue here is whether, because of ineffective assistance of counsel, Bolin was deprived of
7 his Sixth Amendment right to an impartial jury. This right to an impartial jury, in turn, is considered
8 “fundamental” to our system of justice. *See United States v. Montes*, 628 F.3d 1183, 1187 (9th Cir.
9 2011). And because the right to an impartial jury is fundamental to our system of justice, it is not subject
10 to harmless error analysis. *Rose v. Clark*, 478 U.S. 570, 578 (1986) (holding that harmless error analysis
11 “presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument
12 before an impartial judge and jury”). That is, deprivation of the right to be tried by an impartial jury is
13 structural error.

14 The *Strickland* prejudice prong that must be established in this case is whether it is reasonably
15 likely that venue from Kern County would have been changed had Bolin’s attorneys renewed the motion
16 so that Bolin could be tried by an impartial jury. The Warden is mistaken to jump all the way to the
17 ultimate outcome of the case. His approach ignores the importance and fundamental nature of an
18 impartial jury. The claimed deficient attorney performance affects this fundamental right. Therefore
19 the *Strickland* prejudice prong also must focus on this right. The Supreme Court’s opinion in *Moore*,
20 *supra*, 131 S.Ct. 733, bears out the notion that a different outcome in the proceeding doesn’t necessarily
21 call for assessing the relative merits of the prosecution case. In that case, the threshold for *Strickland*
22 prejudice was described as whether but for counsel’s errors, the petitioner would have pleaded not guilty
23 and insisted on going to trial. *Id.* at 743.

24 In Bolin’s case, the Court does not yet know whether there is a reasonable probability venue
25 would have been changed had counsel renewed the motion because the matter of presumed prejudice
26 among the jurors has not been determined. In the evidentiary hearing order, the Court found that Bolin
27 had made out a prima facie case of “presumed prejudice” of the prospective (and actual) jurors and that
28 because of this presumed prejudice, his attorneys should have renewed the change of venue motion. The

1 issue of “presumed prejudice” is what the Court will decide following the evidentiary hearing. Only
2 then, can the Court determine whether there is a reasonable probability venue would have been changed
3 had Bolin’s attorneys renewed the motion.

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The Warden’s second, renewed motion for reconsideration of the August 12, 2012 order granting
Bolin a limited evidentiary hearing IS DENIED. The hearing set for April 15, 2013 IS VACATED.

IT IS SO ORDERED.

Dated: March 21, 2013

/s/ Lawrence J. O’Neill
Lawrence J. O’Neill
United States District Judge