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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA,

v.

JOHANNES MEHSERLE,

Defendant.

No. 161210

Dept: 11

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE

ARGUMENT

I. DEFENDANT HAS FAILED TO MEET HIS BURDEN TO SHOW THAT A CHANGE OF VENUE IS WARRANTED.

As a general rule, the trial of a felony case is to be held in the county where the offense was committed. (Penal Code § 777; *People v. Simon* (2001) 25 Cal.4th 1082, 1093-94.) Under Penal Code section 1033, however, a trial court must grant a motion for change of venue if there is a "reasonable likelihood that a fair and impartial trial cannot be had" in the county where the crime was charged. (Penal Code § 1033(a); *People v. Jenkins* (2000) 22 Cal.4th 900, 943.) In order to meet the defendant's burden of showing a "reasonable likelihood", he must meet a level of proof that is "something more than merely 'possible'" but something less than 'more probable than not.'" (*Ibid.*)

In ruling on the defendant's motion, the trial court typically considers the nature and gravity of the offense, the nature and extent of the publicity, the nature and size of the community, and the status of the defendant and the victim. (*Ibid.*; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1124, *disapproved on another point in People v. Doolin* (2009) 45 Cal.4th 390 at fn. 22.) In considering these factors, however, it is important to keep in mind that the mere fact that a prospective juror has heard of the case does not mean that the juror is biased or unfair.

> "It is not required. . . 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 of 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." (*People v. Harris* (1981) 28 Cal.3d 935, 949-50 *quoting Irvin v. Dowd* (1961) 366 U.S. 717, 722-23.)

An examination of the factors in the instant case shows that defendant has not met the burden required to mandate removal of the present trial from Alameda County.

A. Nature and Gravity of Offense

Though important to the trial court's evaluation of a motion to change venue, "the nature and the gravity of the offense, standing alone, is not dispositive." (*People v. Panah* (2005) 35 Cal.4th 395, 447-48.) Defendant of course, is charged with murder, and the offense of murder is certainly grave. Nevertheless, the mere fact that defendant is charged with murder does not mandate a venue change. The California Supreme Court has frequently upheld the denial of the motion in capital cases, which deal with crimes "of the gravest order." (*People v. Jenkins* (2000) 22 Cal.4th 900, 943. *See, also, e.g., People v. Lewis* (2008) 43 Cal.4th 415, 447 (5 counts of first degree murder with special circumstances, and numerous kidnapping and robbery charges); *People v. Vieira* (2005) 35 Cal.4th 264, 279 (four counts of murder); *People v. Hart* (1999) 20 Cal.4th 546, 598 (rape/sodomy special circumstance murder).)

Defendant contends that the nature of the instant offense requires a venue change: the shooting of an African-American man by a white police officer. Indeed, the nature of the crime is serious and disturbing. Painful as these facts may be however, they pale in comparison to the nature of offenses committed in other cases where the California Supreme Court has rejected a defendant's challenge to a change of venue. In ***People v. Ramirez***, the notorious "Night Stalker" murderer was convicted of 12 counts of murder, as well as multiple counts of forcible rape, sodomy, and oral copulation. One of the victims was "shot in the head and neck at close range, stabbed in her neck, cheek, chest, abdomen, and pubic area, and her eyes had been cut out." (***People v. Ramirez*** (2006) 39 Cal.4th 398, 409.) One of the victims had been burned and beaten and was found with a red pentagram drawn on her thigh. (***Id.*** at 411.) Another was bound with electric cord, sexually assaulted and bruised. Her skull had been punctured. There was a pentagram drawn on the wall of her bedroom. He viciously raped another woman, then tied up the woman's eight-year-old son and beat him. (***Id.*** at 414-15.) Many of the other crimes were equally brutal. Though noting that "the 'nature and gravity' of the ... offenses could not have been more serious," the California Supreme Court concluded that this factor alone did not require a change of venue; the court went on to uphold the trial court's denial of the motion for change of venue. (***Id.*** at 434-35. *See also* ***People v. Lewis*** (2008) 43 Cal.4th 415, 447 (5 counts of first degree murder with special circumstances, and numerous kidnapping and robbery charges); ***People v. Vieira*** (2005) 35 Cal.4th 264, 279 (four counts of murder); ***People v. Hart*** (1999) 20 Cal.4th 546, 598 (rape/sodomy special circumstance murder); ***People v. Welch*** (1999) 20 Cal.4th 701, 744 (murder of six people including a four-year-old and a two-year-old); ***People v. Hart***, *supra*, 20 Cal.4th at 598 (upholding denial of venue change in rape/sodomy murder of one 15 year old girl and rape, sodomy and forcible oral copulation of second 15-year-old).) The facts of the present case, though painful are a far cry from the horrific facts of cases like *Ramirez* and *Lewis*.

The instant facts bear a closer resemblance to the facts in ***People v. Zambrano***. In ***Zambrano***, the defendant was a city official. (***People v. Zambrano*** (2007) 1 Cal.4th 1082. 1125-26.) He was arrested in a felony assault case. After being released on bail, the defendant made arrangements to meet with the principal witness against him in the assault case. The witness was never seen alive again; his decapitated and dismembered body was found near a reservoir. One of the witness's hand was found in a separate location, and nearly a year later the victim's skull was found in a location near the site where his torso was originally recovered. Overwhelming evidence linked the defendant to the victim's death, and he was ultimately arrested. There was a substantial amount of publicity. The defendant's change of venue motion was denied and he was ultimately convicted of the murder with the special circumstance of killing a witness. The defendant's appeal claimed, among other things, that the trial court erred in denying the motion for change of venue. The defendant argued that the charges were unusually gruesome and sensational. The trial court found that the charges were indeed serious, but "no more so than those increasingly common in a modern urban society." (***Id.*** at 1124.) The California Supreme Court upheld the trial court's decision. The court noted that the charges were serious, but that "the facts were not so extreme as to mandate [moving the case] on that basis alone." (***Id.*** at 1125.) The court went on to uphold the trial court's decision to deny the defendant's transfer motion.

The facts in ***Zambrano*** are graver than the instant facts: Zambrano's was a capital case; defendant's is not. The facts in ***Zambrano*** were more egregious than the instant facts: the defendant there planned the murder in advance; dismembered the body in an effort to hide the crime; and was motivated by a desire to hide evidence of other crimes he had committed. In the instant case, the crime was brief; the murder took but a single action, and the defendant remained at the scene after the killing. As in ***Zambrano***, defendant here was a government official–a police officer. That fact is no more sufficient to justify transfer for him than for ***Zambrano***. If the nature and gravity of the crime in ***Zambrano*** was not such as to require a change of venue, neither can the

milder facts of the instant case. As in ***Zambrano***, this factor "adds weight" to the defendant's motion, but less weight than the ***Zambrano*** facts, and not enough weight to require a change of venue.

B. Nature and Extent of Pretrial Publicity.

The nature and extent of media coverage is one of the important factors the court must consider. (***People v. Leonard*** (2007) 40 Cal.4th 1370, 1394.) Nevertheless, "pervasive publicity alone does not establish prejudice." (***People v. Prince*** (2007) 40 Cal.4th 1179, 1214.) A transfer of venue is not necessarily required even in cases where there is extensive print and television coverage. (***Id.*** at 1218.

In ***People v. Prince***, the defendant was convicted of six counts of murder, five counts of burglary and rape. Media coverage was extensive. At one point, a commentator compared the defendant to Jack the Ripper and referred to the defendant's "reign of terror." (***Id.*** at 1218.) Nevertheless the court found that a change of venue was not required. The bulk of the articles merely recounted the facts of the crime in neutral terms. The articles did not amount to an "out-of-court campaign" to convict, and the language did not consistently refer to the defendant in incendiary terms. The court also noted that coverage had subsided in the months leading up to trial. The Court concluded that defendant had failed to demonstrate that "his was one of the extraordinary cases where prejudice must be presumed", and upheld the trial court's ruling. (***Id.*** at 1218-19.)

After he was convicted of six counts of murder in ***People v. Leonard***, the defendant complained that his pretrial change of venue motion was erroneously denied. In that case, the defendant was dubbed the "Thrill Killer" by the media. The court described the media's coverage of the case as sensational and extensive. The defendant cited 556 television segments on the killings and 130 newspaper articles. Defense-commissioned surveys showed that 85% of the public had heard of the case, and more than half were aware that at one point the defendant suddenly announced in open court that he was guilty. Fifty-eight percent of those surveyed believed that the defendant

was either definitely or probably guilty. Nevertheless, the California Supreme Court found that a change of venue was not required. The court noted that four years had elapsed between the arrest and the trial, and that no inadmissible evidence had been released. (***People v. Leonard***, *supra*, 40 Cal.4th at 1395-96.)

In the instant case, media coverage of this incident has indeed been widespread. That coverage was especially pervasive in the initial weeks following the crime. It is probable that the majority of Bay Area residents saw the videos of the crime that were aired widely on television and on the internet. Though coverage persists, however, the intensity of that coverage has been greatly diminished, a factor ***Prince*** relied on in upholding the trial court's decision not to transfer that case. Further, though some individuals and organizations have publicly expressed a belief in defendant's guilt, the vast majority of the reports have been neutral and fact-driven. The coverage as a whole does not amount to an out-of-court campaign to convict defendant.

The fact that so many have seen videos of the incident does not require a change of venue. All that the videos establish is that defendant shot and killed Oscar Grant. The defendant does not dispute this. The question the jury must answer is not whether defendant killed Oscar Grant, but whether in doing so he committed the crime of murder. The answer to that question will require the jury's careful consideration, not only of the videos, but of the other facts and circumstances surrounding the case. Far more damaging than the videos was the admission of the defendant in ***Leonard*** that he was guilty. Yet despite the fact that more than half of the public was aware that Leonard had admitted guilt, the California Supreme Court upheld the trial court's denial of the change of venue motion.

Defendant's own statistics show that no change of venue is warranted. Despite the widespread publicity and the prevalence of the videos, only 44.8% of those responding to defendant's survey thought that defendant was guilty. (Declaration of Edward Bronson at p. 25.) In ***Leonard***, the California Supreme Court noted that twenty-two percent believed Leonard was definitely guilty, and thirty-six percent

thought he was probably guilty, and concluded that "much of the community was keeping an open mind on the question of defendant's guilt." (***Leonard***, *supra*, 40 Cal.4th at 1396.) Even more of the Alameda County community is keeping an open mind. For those familiar with this community's long history of tolerance, fairness and open-mindedness, that is not surprising.

To paraphrase defendant's expert, the fact that 45% of the jurors are inclined to believe that defendant is guilty means that for every 100 jurors who walks through the courthouse door, 55 of them will either be neutral or favorably disposed to him. Fifty-five would be a pretty good number to start the panel with, and in a county of this size, a fair panel could certainly be obtained. Thus, on balance, the coverage, though extensive, is neither prejudicial nor inflammatory. Defendant's own statistics show that it is possible to select a jury that is neutral. Accordingly this factor does not support defendant's motion.

C. The Size and Nature of the Community

The size and nature of Alameda County's population weighs heavily against a change of venue. In the Alameda County Case of ***People v. Zambrano***, the California Supreme Court observed:

> The parties agree with the court below that, at the time of defendant's trial, the population of Alameda County, a metropolitan area, well exceeded one million persons. [Citation] As the trial court suggested, the county's size and diversity weigh strongly against a change of venue. We routinely have upheld refusals to change venue from much smaller counties.

Size alone is not sufficient, by itself, to preclude a change of venue. As defendant points out, the Court of Appeal in ***Powell v. Superior Court*** ordered a change of venue from Los Angeles, California's largest county with more than six million people at the time the case was decided. (***Powell v. Superior Court*** (1991) 232 Cal.App.3d 785, 795-96. Nevertheless, the courts have found that the size of counties smaller than Alameda have weighed "heavily against" a change of venue. (***People v. Pride*** (1992) 3 Cal.4th 195, 224 (upholding trial court's finding that "size and metropolitan nature of

[Sacramento] county weighed heavily against a change of venue.")) The larger the population, the more likely it is that preconceptions about the case have not been imbedded in the public consciousness... ." (***People v. Prince*** (2007) 40 Cal.4th 1179, 1213.) Undoubtedly there are some in this county who have prejudged the facts of this case and defendant's guilt–some for and some against. But in a county of this size, and with the historic tradition of open-mindedness of Alameda County residents, that number will be dwarfed by the number of people who can remain fair and impartial.

D. Status of the Accused and of the Victim.

In discussing the status both of defendant and the victim, defendant argues facts to the public's perception of both men *after* defendant killed the victim. The focus of this factor is not on the community perceptions in the wake of the crime, but their status in the community before the crime. In ***People v. Ramirez***, the California Supreme Court considered the status of the victim and defendant and noted that "Neither defendant nor the victims were known to the public prior to the crimes and defendant's arrest, so [these] factors-the community status of the defendant and the prominence of the victim do not support a change of venue." (***People v. Ramirez*** (2006) 39 Cal.4th 398, 434.) In ***People v. Prince***, "[n]either the defendant nor the victims were prominent or notorious apart from their connection with the ... proceedings" at issue there. The court concluded that "any uniquely heightened features of the case that gave the victims and defendant any prominence in the wake of the crimes, which a change of venue normally attempts to alleviate, would inevitably have become apparent no matter where defendant was tried." (***People v. Prince*** (2007) 40 Cal.4th 1179, 1214 (*citations, quotations and brackets omitted*).)

The defense attempts to make the case that defendant, a white male police officer who grew up in another county, is an outsider who will be judged unfairly because of his status. It is true that the community status of the defendant must be taken into account in evaluating a change of venue motion. (***People v. Ramirez*** (2006) 39 Cal.4th 398, 434.) Defendant's stature prior to this incident would by no means have rendered

him the sort of "friendless in the community" defendant whom pretrial publicity can most prejudice. (*See Martinez v. Superior Court* (1981) 29 Cal.3d 574, 584-85.) He is not a member of a minority group or a drug addict (*Ibid.*), a parolee, with a history of escape or of mental problems. (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 940.) Defendant "was not a friendless newcomer or transient, or a despised outcast ... ." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1126.) On the contrary, most jurors are inclined to view police officers favorably.

Before the shooting, the victim was not well known or especially revered by the wider community. Oscar Grant, like the victims in many other cases, was "prior to [his] victimization ... not [an] exceptionally visible [member] of the community" and only his status as a victim propelled him to prominence. (*People v. Clay* (1984) 153 Cal.App.3d 433, 447-48.) Though media coverage of the crime has given the victim what one appellate case would call "'posthumous celebrity,' it is [Mr. Grant's] status as [a] helpless [victim] that propelled [him] to prominence. ... [H]ostility would doubtlessly have followed the [perpetrator] to any community in the state to which venue would have been transferred." (*Id.* at 448.)Since his death, media portrayal of Oscar Grant has been sympathetic, but since he was not well known, this factor weighs against movement of the case. (*See People v. Leonard* (2007) 40 Cal.4th 1370, 1397.)

E. Political Factors.

Although political considerations are not generally a part of the change-of-venue analysis employed by the courts, the courts have recognized that a venue change may be appropriate if a case involves political controversy. (*People v. Lewis* (2008) 43 Cal.4th 415, 448 (noting that political controversy has in the past been a factor in change of venue motions).) In cases where political overtones have been a factor in changing venue, the courts have looked at whether there has been not just politics, but a political controversy generated by the trial. (*See, e.g., Maine v. Superior Court*, *supra*, 68 Cal.2d at 387 (original trial judge, defense counsel and prosecutor were opposing candidates for same office where there was risk that political competition could intrude into

proceedings); ***Smith v. Superior Court for Los Angeles County*** (1969) 276 Cal.App.2d 145, 149 (indictment for bribery and corruption became subject of highly publicized and bitter campaign for office).) While the instant case has elicited public comment from some political officials, it has not elicited any political controversy. The present case has sparked protests, and some self-styled watch groups, but no political campaign or contested elections.

There are some similarities between the instant case and ***Powell v. Superior Court***. (***Powell v. Superior Court*** (1991) 232 Cal.App.3d 785.) The ***Powell*** case took place in Los Angeles County. The defendants were four Los Angeles police officers charged with beating a suspect. The beating was surreptitiously captured on video, and the video was sold to the media and widely played and distributed. The release of the video caused community reaction ranging from "shock, outrage, revulsion, and fear to disbelief ... ." (***Id.*** at 790.) In the aftermath of the beatings, the community and community leaders sought an inquiry into the matter, and these were focused on the police department and its chief.

> [S]hortly after the incident, a political furor erupted which has been compressed into an intense four month period. The Mayor called for the Chief either to resign or to retire. The Police Commission placed the Chief on inactive status; he responded with a lawsuit. The City Council intervened reinstating the Chief. A power struggle ensued among the Chief, the Mayor, the City Council and the Police Commission.
>
> During this period, vigorously contested elections for City Council positions were occurring throughout the city. All candidates took positions essentially in support of either the Mayor or the Chief. The Chief himself endorsed and campaigned for at least one candidate who was seeking another term to represent northwest valley residents. Such support was even reflected in bumper stickers.
>
> (***Id.*** at 798.)

The political controversy did not end there. A commission was formed to resolve the political crisis. The commission's report was critical of police operations. The issuance of the report led to rumors about the chief's tenure. Some members of the commission demanded that the chief step down. (***Id.*** at 799-800.)

The court of appeal was also concerned about the threat of violence. Citing a Florida case, the court noted the concern that "an entire county would respond to a not

guilty verdict by erupting into violence." The court itself "received a document which can be construed only as a threat of community violence if the case is transferred ... ." (*Id.* at 801.) The court said, "If the mere possibility of an order directing that trial be conducted outside Los Angeles County gives rise to such threats, we must draw the inevitable inference about the possibility of threats which could surface during the trial itself." (*Ibid.*)

With this highly charged and political backdrop, the Court of Appeal ordered the transfer of the trial from Los Angeles County. In announcing its opinion, the court stated, "We emphasize ... that were this simply a matter of extraordinary publicity we might have reached a different conclusion. What compels our decision in this case is the high level of political turmoil and controversy which this incident has generated, which continues to this day and appears likely to continue at least until the time when a trial of this matter can be had." (*Id.* at 790.)

In the instant case, many of the reactions of the public to the videos in this case were similar to the reactions generated by the release of the videos in the *Powell* case. As the defendant points out, there were protests in the Oakland area. While the vast majority of those demonstrating were peaceful, fringe elements broke away and committed numerous acts of vandalism and caused substantial property damage in downtown Oakland. As in the *Powell* case, the damage was widely reported in the media. As in the *Powell* case, inquiry was made into BART police operations, and there has been calls for reform of BART police policies and procedure. But here the paths of the two cases diverge.

No political war has developed between the Mayor and the BART Police. BART has called for its own investigation. There have been no reports of bitter election disputes arising because of the incident. There has been no reports of a power struggle to oust the BART police chief; indeed the Chief is voluntarily retiring after more than 40 years in law enforcement.

In *Powell*, threats of violence were so great that even the court of appeal received a threatening document. The atmosphere of the judicial proceedings in the instant case is far more moderate. In this community, the response of the Oakland Police Department to the protests was exemplary. Their reaction to the protests was measured and restrained. This moderate response has helped to dampen the violence and vandalism. The family of the victim, who were most wronged by this horrible crime, have also helped to restrain the violence by calling for calm. The community itself has responded to media reports of the vandalism with revulsion. As a result, the ugliness of violence has dissipated. Even the vandals have responded. While there are still occasional demonstrations, they are peaceful, and, usually, sparsely attended.

It is possible that some jurors will be mindful of the previous vandalism and destruction, and those jurors may have concerns that a not guilty verdict might result in a similar outburst. This does not mean that the juror cannot set aside those feelings and sit impartially at trial. A juror exposed to publicity may still serve if he or she can lay aside his or her impressions and render a verdict based on the evidence presented in court. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1214.) As discussed more fully below, however, the voir dire process will allow the court to remove any jurors who would allow their verdicts to be influenced by these considerations.

Powell is also distinguishable for another reason. Opinion polls conducted in that case showed that 81% of those surveyed believed the defendants were guilty, 70 percent of them strongly. Only 3% believed defendants not guilty. (***Id.*** at 796.) As discussed more fully above, those numbers sharply contrast with the numbers in the instant case. In the instant case defendant's pollster reports that 27% of the respondents believed that defendant was not guilty or probably not guilty. That is nine times the figure in ***Powell.*** In the instant case only 45% believed the defendant was guilty, just over half the number in ***Powell***. Significantly, only 16.5% believed that defendant was definitely guilty, less than a fourth of the number in ***Powell.*** In other words this is a community far more open-minded than the community in ***Powell.***

II. DEFENDANT'S ARGUMENT ABOUT RACIAL OVERTONES DOES NOT SUPPORT A CHANGE IN VENUE.

The defense contends that "[t]he biggest obstacle" to juror impartiality in Alameda County is that "the black community has prejudged Mehserle guilty of a crime." (Defense motion at p. 68.) The defense states that the parties will agree that African Americans "should and must be part of the jury in this case", but in the same paragraph indicates an intention to subject potential African American jurors to "intense, awkward, personal and uncomfortable" questioning that would "almost certainly lead to outrage in the community and perhaps further civil unrest." (Defense motion at p. 68-69.) The defense claims that it will be "entitled to question every black juror, in private, in substantial depth, about pre-judgment." The People are troubled by the defendant's argument for several reasons.

First, the People dispute the defense notion that a high proportion of African Americans in this county are incapable of being fair. As discussed more fully below, the crucial question to be put to every juror is not whether the juror has heard about the case, or has formed an impression about the issues of the case. The crucial question is whether the jurors can put aside any knowledge or impressions of the case and judge the question of defendant's guilt fairly and impartially and solely on the basis of the evidence presented at trial. While some jurors will inevitably have biases of various kinds, the People are confident that the majority of potential African American jurors in this county will be able to serve fairly and impartially.

Second, the People are alarmed by the defense's apparent belief that the defense is entitled to subject African American jurors to some separate screening procedure out of the public eye. It might be that the trial court would determine that some sort of *Hovey* voir dire would be appropriate for *all* the potential jurors in this case. But to single out African American jurors for this treatment is unwarranted, unprecedented and inappropriate.

Third, from the People's perspective, murder–not race– is the issue here. But even assuming that race would play a significant role in this case, a change of venue would not assist the defendant. The California Supreme Court has acknowledged that at times racial prejudice may be at issue in a criminal case. (***People v. Prince*** (2007) 40 Cal.4th 1179, 1214 (acknowledging that rape of white women by African American defendant could raise racial prejudice).) However, as the Supreme Court has pointed out, "This element of possible prejudice presumably would follow the case to any other venue, however." (***Ibid.***)

III. THE TREND OF CURRENT AUTHORITY IS TO CONSTRUE REQUESTS FOR VENUE CHANGE MORE STRINGENTLY.

The most recent appellate case defendant cites *upholding* a change of venue is the 1991 case of ***Powell v. Superior Court***. (***Powell v. Superior Court*** (1991) 232 Cal.App.3d 785. On the other hand, defendant's expert cites quite a few cases decided since that time in which the denial of a venue transfer motion was upheld. Indeed, there are many recent cases upholding the denial of a change of venue. (*See, e.g.*, ***People v. Farley*** (2009) 46 Cal.4th 1053, 1087; ***People v. Lewis*** (2008) 43 Cal.4th 415, 450; ***People v. Zambrano*** (2007), *supra*, 41 Cal.4th at 1125; ***People v. Ramirez*** (2006) 39 Cal.4th 398, 434; ***People v. Panah*** (2005) 35 Cal.4th 395; ***People v. Coffman*** (2004) 34 Cal.4th 1, 46; ***People v. Jenkins*** (2000) 22 Cal.4th 900, 944.)

It is still the case that a defendant is entitled to a change of venue if he can demonstrate a reasonable likelihood that he cannot have a fair and impartial trial in the county where the crime was charged. (***People v. Jenkins*** (2000) 22 Cal.4th 900, 943.) And the mere fact that there are relatively few recent published cases in defendant's favor does not mean that a defendant can have no hope of prevailing in such a motion. (*See, e.g.*, ***People v. Davis*** (2009) 46 Cal.4th 539 (upholding trial court's decision not to grant a second change of venue motion after the trial court granted defendant's initial request and moved the trial out of the county where the crime was committed).) The recent history, however, suggests that such a measure be taken rarely.

There are good reasons to avoid moving a criminal trial. First, is the obvious cost. Relocating trial staff and attorneys and investigators for the parties is expensive, to say nothing of the added transportation costs of witnesses.

Second, a trend away from venue transfers reflects an implicit awareness of the diminished powers of the media. In recent years, the public has been flooded with mass media, and in particular with video imagery. This has resulted not so much in a public that is desensitized to such imagery, but a public that is more critical and discerning in its perception of such imagery.

Third, the transfer of venue is an exception to the law's preference to have the trial of an offense take place in the community where the crime was committed. (Penal Code § 777.) It also subordinates the right of that community to have the trial heard by its own citizens. (*See* ***People v. Tamble*** (1992) 5 Cal.App.4th 815, 820 (noting that the right of vicinage protects both the jury trial rights of a defendant and "the right of the offended community to pass judgment in criminal matters").)

IV. ANY POTENTIAL FOR BIAS IS BEST RESOLVED BY VOIR DIRE RATHER THAN SPECULATION.

It is a longstanding practice for the court to defer a decision on the change of venue until the jury venire is empaneled. (***People v. Farley*** (2009)46 Cal.4th 1053, 1085.) There is good reason for this practice. The process of evaluating a motion for change of venue in the pretrial context is necessarily speculative. The parties are left to guess what jurors are likely to say and how they are likely to hear based on cases, newspaper articles, pollsters and pundits. The best way to find out whether a juror can be fair is through the voir dire process. As the California Supreme Court has observed, "[T]he necessity of granting a pretrial change of venue based on speculation decreases in direct proportion to the readiness of trial courts to fulfill their duty to change the place of trial when actual voir dire reveals as a fact that the right to a fair trial so demands." (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 947.)

When the court waits until after the jury selection has begun, the court has heard from the jurors who are to sit on the case, and has had the opportunity to evaluate the jurors ability to be fair. (***People v. Farley***, *supra*, 46 Cal.4th at 1085.) The parties have had the chance to challenge individual jurors for cause, and to exercise peremptory challenges, and the court can evaluate the remaining number of challenges left to the parties in deciding whether to grant the motion. (***Ibid.***) And indeed the California Supreme Court has affirmed a number of cases in which the trial judge ruled after voir dire had begun. (***Ibid.*** *Accord, e.g.*, ***Zambrano***, *supra*, 41 Cal.4th at 1127-28; ***Leonard***, *supra*, 40 Cal.4th at 1396. *See also* (***People v. Ramirez*** (2006) 39 Cal.4th 398, 434-35 (supreme court considered actual juror responses at trial in evaluating denial of pretrial change of venue motion.)

Defendant contends that voir dire is not a suitable way of determining if jurors can be fair because jurors cannot be trusted to know or to honestly say whether they can be fair. His argument resembles the argument made in ***People v. Prince***.

> Defendant insists we cannot believe jurors who are aware of publicity but profess not to have formed an opinion concerning guilt or otherwise to have been prejudiced by publicity. Although "such assurances are not conclusive" [citation], neither do we presume that exposure to publicity, by itself, causes jurors to prejudge a defendant's guilt or otherwise become biased. [Citation.] "[T]he Supreme Court has made clear that we cannot, as a general matter, simply disregard a juror's own assurances of his impartiality based on a cynical view of 'the human propensity for self-justification.' " [Citation.] It was the function of the voir dire examination to expose actual bias or prejudice, but the voir dire in this case did not demonstrate a biased or prejudiced jury.
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> (***People v. Prince***, *supra*, 40 Cal. 4th at 1215.)

Though the People are confident that a fair jury can and will be selected in Alameda County, the People acknowledge the possibility that voir dire may reveal otherwise. The People urge the Court, however, to take the word of the jurors on this matter, not the word of the defense expert.

CONCLUSION

The defendant has not shown a "reasonable likelihood" that he is unable to obtain a fair and impartial trial in Alameda County. The offense charged, though grave, is far less sensational than many cases in which the change of venue was denied. Media coverage has been extensive, but the bulk of it has not been inflammatory. Neither the defendant's nor the victim's status supports a transfer. The fact that the victim may be the object of some sympathy is far outweighed by the large, diverse, and fair-minded population of Alameda County. The political implications in this case do not rise to the level of a case such as ***Powell***, and do not support moving the case. Finally, though there may be some concern that jurors' ability to be fair will be hampered by their concern for possible repercussions in the community, the best way to resolve this question is through voir dire rather than speculation.

For the foregoing reasons, the People respectfully request that defendant's motion be denied.

DATED: September 24, 2009

Respectfully Submitted,

NANCY E. O'MALLEY
District Attorney

by: _____

Micheal O'Connor
Sr. Deputy District Attorney

_____

David R. Stein
Deputy District Attorney

MAIL PROOF OF SERVICE

I declare that I am employed in the County of Alameda, State of California; that I am over the age of eighteen years; that I am not a party to this action; and that my business address is 1225 Fallon Street, Suite 230, Oakland, California 94612.

On 9/24/2009, I served a copy of the attached MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE. in the case of *People vs. JOHANNES MEHSERLE.*, Alameda County Superior Court No. 161210, on defense counsel as follows:

Michael L. Rains
RAINS LUCIA STERN, PC
2300 Contra Costa Blvd., Suite 230
Pleasant Hill, CA 94523

☐ FAX NUMBER – I served the above-described document on defendant's attorney in the above-numbered action by sending a true and correct copy by a facsimile machine to the name and telephone number indicated above, and that said transmission was reported as complete and without error;

☐ PERSONAL DELIVERY – I personally served the above-described document on defendants in the above-numbered action by leaving it with the receptionist for the attorney's office named above;

☑ U.S. MAIL – I served the above-described document on defendant's attorney in the above-numbered action by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the U.S. Mail, addressed as indicated above;

☐ ELECTRONIC MAIL – I served the above-described document on defendant's attorney in the above-numbered action by email a true and correct copy thereof enclosed in pdf format to the addressed indicated above;

☐ OVERNIGHT MAIL – I served the above-described document on defendant's attorney in the above-numbered action by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in a receptacle at the Napa County District Attorney's Office serviced by Federal Express, addressed as indicated above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 24, 2009

M. Day

Mercedes Day
Supervising Clerk I