SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. JOHANNES MEHSERLE, Defendant.	No. 161210 ORDER OF THE COURT ON DEFENDANT'S MOTION TO CHANGE VENUE

FILED
ALAMEDA COUNTY
OCT 16 2009
By

I. INTRODUCTION

On January 1, 2009, BART police officer Johannes Mehserle shot and killed BART passenger Oscar Grant on the train platform at the Fruitvale BART station during an arrest procedure associated with the investigation of a fight on a train. Several train passengers video recorded this incident on their cell phones. Defendant Mehserle was charged with the murder of victim Grant and held to answer. Trial on the murder charge is now set on November 2, 2009, in Department 11, which is the felony master calendar court in Northern Alameda County.

On September 11, 2009, defendant filed a motion to change venue for trial in this case. Defendant's filing in support of this motion includes a 70 page opening brief, and a declaration by defense counsel Michael Rains that references 14 Exhibits that fill more than two banker's boxes. Among these exhibits is a 35 page declaration of defense change of venue expert Edward Bronson, Ph.D., J.D. Attached to Dr. Bronson's declaration are materials related to a survey of 397 Alameda County residents that was conducted in July 2009 by a polling firm run

by Mark Winkelman. These materials include a copy of the survey, a description of the methodology used, the raw results and analysis of those results by Dr. Bronson.

Additionally, among defendant's 14 Exhibits are copies of newspaper articles, texts of television and radio broadcasts and logs related to media publishing activity about this case. Further, the Exhibits include some sample flyers that have been circulated locally and some information about some of the political action groups who have taken an interest in this case.

On September 24, 2009, District Attorney Nancy O'Malley filed a 17 page response brief. On October 1, 2009, defendant filed a 26 page reply brief. The hearing on this motion began on October 6, 2009, and concluded on October 9, 2009. Four half day afternoon sessions were held.

At the hearing, a 35 page declaration by the primary defense expert, Edward Bronson, Ph.D., J.D., was admitted. Dr. Bronson was unable to testify in person due to sudden severe illness that he suffered about two weeks before the long scheduled venue hearing. Thus, the defense substituted Craig New, Ph.D., a social scientist and expert consultant in the area of the effects of pretrial publicity on potential jurors. With not more than 10 days to prepare, Dr. New reviewed Dr. Bronson's work in this case and then testified for two days.

Massive documentary exhibits were admitted into evidence at this hearing. Included in the evidence admitted were logs of and the texts of more than 4,000 newspaper, television and radio articles and stories that have been published locally in the first 8 months of this year. The evidence admitted also included the survey that was conducted in July 2009 and materials related to it.

Almost all of the evidence offered and admitted in this hearing was produced by the defense. The prosecution offered and had admitted seven exhibits. Of those, the first four were copies of defense moving papers or exhibits that were used to cross examine Dr. New. The remaining three prosecution

exhibits included a one page newspaper poll, a copy of a jury instruction and a hand written chart, all of which were used in cross examination.

The parties presented oral argument for the final two days of this hearing. At the end of those arguments, the parties agreed that the court could consider events relevant to the change of venue issue that the court either has personally experienced or where the court was required to deal with occurrences in the scope of its administrative duties. The court agreed not to, and will not, consider occurrences relevant to the change of venue that are not in evidence and that were simply hearsay that was reported to the court in either its personal or professional capacity.

II. FINDINGS OF FACT

1. The crime charged in this case is murder. No special circumstances are alleged. The range of possible verdicts include first or second degree murder, voluntary or involuntary manslaughter and not guilty.

2. The nature of the homicide is rare and nearly unique for a charged homicide case in that the defendant is accused of committing a murder in the course and scope of his duties as a uniformed police officer while making an arrest. Further, the nature of this crime has an implied racial aspect to it in that the defendant is Caucasian and the victim was African American.

3. The print media coverage of this case has been massive in scope. Eighteen San Francisco Bay Area newspapers published 1,867 articles covering this case between January 1, and August 31, 2009. These 18 newspapers account for the vast majority of newspaper circulation in the San Francisco Bay Area. (Exhibits 2, 3 and 4 to the declaration of Michael Rains.) The parties stipulated that the four

largest newspapers in the Bay Area published an additional 70 articles between September 1, and October 7, 2009.

There has been extensive coverage of this case every month since the incident occurred. The least amount of print media coverage occurred in July 2009. In July there was almost no activity in this case (the lone event was the continuance of a Penal Code § 995 motion from late July to early September), but nevertheless 38 printed articles were published in the local newspapers. The next lightest month was August, during which 64 articles were published.

This court has seen and read many of these articles at or near the time that they were published. This court is a daily reader of the San Francisco Chronicle and a frequent reader of the Contra Costa Times and the Oakland Tribune.

4. Television coverage has been equally extensive. Six local television stations, including the local ABC, CBS, Fox and NBC affiliates, broadcast 1,970 television news segments between January 1, and August 31, 2009. (Exhibits 5 and 6 to the declaration of Michael Rains.) Some of that television coverage was presented and admitted into evidence in video form. (Exhibit 7 to the declaration of Michael Rains.) Further, since January 1, 2009, this court has seen many television news broadcasts at the time that they were aired.

5. Similarly, radio coverage has been voluminous. Three local stations aired 343 radio news stories between January 1, and May 18, 2009. (Exhibit 8 to the declaration of Michael Rains.) The radio coverage, although not documented beyond May 18, 2009, has continued to be extensive. This court has heard many news stories about this case on the radio over the months since May 18, 2009. Most recently, in the week of October 5, through October 9, 2009, during which the change of venue hearing was held, this court heard more than 20 radio news stories during the morning and evening commute hours.

6. Extensive and massive internet attention has been devoted to this case. To what degree this internet exposure has reached the potential jury pool in Alameda County is unknown. Evidence admitted in this case shows that the Oakland Tribune reported on January 7, 2009, that the video of this homicide had been downloaded from the website of local television station KTVU Channel 2 for viewing more than 500,000 times. (Exhibit 11 to the declaration of Michael Rains.)

7. The extensive media coverage of this case has included coverage of the homicide incident itself, detailed tracking of the court proceedings, the response of government and community leaders and the public reaction to this case. Upon review of the defense documentary evidence, expert opinions and arguments, this court finds that some occasional inaccuracies in the media coverage exist and some debatable prejudicial slants adverse to defendant on minor points can be argued; nevertheless, the overall coverage appears to be accurate, non-sensationalized and not prejudicial.

8. The defense conducted a survey of 397 potential jurors in Alameda County. The survey itself, the methodology used, and testimony about the good reputation of Mark Winkelman, the market research consultant who conducted the survey, were admitted into evidence. (Exhibit 1 to the declaration of Michael Rains.) Dr. New, based on his review of Dr. Bronson's declaration and the survey materials and his knowledge of Winkelman's firm, provided testimony about the preparation, quality and integrity of the survey. This evidence shows that the survey was properly conducted according to the standards used in the academic and consulting arena of social science that studies potential juror behavior in the context of high profile cases.

9. The prosecution offered no evidence of having conducted any additional surveys. The prosecution offered no expert evidence on the issues before this court.

10. The survey evidence shows that the media coverage has absolutely saturated the potential jury pool in Alameda County. An overwhelming majority, 97.7%, of those polled recognized the case. More than 70% of the respondents have already formed opinions on defendant's guilt or innocence.

11. Dr. New testified that the recognition question, which includes words to the effect that a BART police officer shot an unarmed young man while he lay face down on the station platform, was drawn from the phrases that the media has used repetitively to describe the case. The prosecution urged the view in cross examination and in argument that the recognition question was inflammatory. In contrast, the defense argued to this court that the recognition question in the survey was fair and proper, that it did not inflame the respondents such that the reliability of the survey was undermined. Dr. New has accurately described the key descriptive language in a large portion of the news articles published about this case[1]. Dr. New's explanation for the design of the recognition question is credible.

[1] Ironically, both parties take inconsistent views about a related but different aspect of the same subject matter: the prosecution also argues that the press coverage "though extensive, is neither prejudicial nor inflammatory" (District Attorney's response brief at p. 7); while the defense has repeatedly urged that the press coverage "has been extraordinarily prejudicial." (Defense opening brief at p. 25; see also e.g. pp. 13-25; 40; and defense reply brief at pp. 9-12.) The court finds that the press accounts overall have accurately described what the video evidence in this case shows. The press has done so with little gratuitous sensationalizing of the details of the homicide. Thus, this aspect of the press coverage, while extensive, has not been overly inflammatory or prejudicial.

12. In other areas substantial defense bias by the experts has been established. This bias appeared in several areas of significance, and thus rises to the level of being the subject of a factual finding.

A. First, in direct examination, Dr. New, in response to a question that did not signal in any way the type of answer that was coming, apparently took a rehearsed cue from defense counsel Rains and rapidly spouted off several highly offensive racist comments attributed to survey respondents.[2] There was no warning that such vitriol was about to come forth.

At the point in the hearing when this premeditated vituperative display was conducted, there was not an empty seat in the courtroom. This packed audience of about 100 people included six or seven members of the victim's family, their plaintiff's civil rights attorney, numerous people wearing t-shirts or other regalia that would identify them as activists or protesters, numerous members of the community and about twenty or so members of the press. At least half of the audience appeared to be African American.

When Dr. New suddenly spewed these inflammatory remarks, members of the audience audibly gasped. The court intervened and stopped the gratuitous display of racial hostility. Although Rains half heartedly sought to justify this lowbrow and unnecessary tactic, it was obvious that he was attempting to cause a disturbance in the courtroom, presumably to show the need to change venue. It was also clear that Dr. New was quite willing to assist. This testimony demonstrated the expert's lack of independence from defense counsel.

B. Second, at the beginning of cross examination, Dr. New testified that at the last minute, he dropped whatever he was doing and spent nine or ten days reviewing the voluminous information in this case. Dr. New went on to state that he and defense counsel Rains had not discussed his compensation and that he did

[2] Dr. New offered the following quotes: "One less black person in this city is fine with me." "I have to walk through a damn bunch of black people asking me for things." "We ought to shoot these people". "Black people seem to have extra rights."

not know what he was going to be paid. Dr. New stated that he had spent more than 20 hours on the case as of the start of his testimony and that he had flown to Oakland from Portland, Oregon, with no agreement as to his compensation. Dr. New stated that he was confident that he would get paid, and that perhaps Dr. Bronson had told Rains how much he should get paid.

In his first reference in cross examination to Rains, Dr. New familiarly and warmly referred to him as "Mike". When corrected by the prosecutor, he apologized and referred to defense counsel as "Mr. Rains" thereafter. Dr. New went on to admit that he had never had contact with defense counsel before the week and one half prior. Dr. New stated that it was his hope to get more work from Rains in the future.

Dr. New's answers in these exchanges at the start of cross examination left the court with the uncomfortable concern that Dr. New might be trying too hard to please defense counsel. Thus, the prosecutor established a palpable level of bias in regard to Dr. New.

C. Third, during cross examination about a key point in the survey, i.e. whether respondents were concerned about possible violence in the event of a not guilty verdict, Dr. New admitted the question posed on this issue suffered from "response bias". Dr. New explained that response bias occurs when a question in a survey is front loaded with a lead-in sentence that encourages the respondent to answer in a certain way. Dr. New testified that Dr. Bronson designed the survey and included the objectionable question in the survey. This testimony demonstrated bias in favor of the defense in the design of the survey.

D. Fourth, Dr. New testified, and Dr. Bronson opined, that the overall prejudgment rate of about 44% for guilt was artificially low and that the prejudgment rate of about 27% for not guilty was artificially high. Both experts told the court that it should instead assume a 1% to 3% rate of not guilty prejudgment, as opposed to the 27% rate that the survey yielded. These opinions are highly favorable to the defense.

In responding to cross examination about this opinion, Dr. New said several things, that when taken together, are inconsistent at best: first, he said he would not include even one instruction in the survey; second, he said most people know what murder is and need no definitional help; and third, he said if the survey had included a question about lesser included charges to murder that the overall guilt response would have been about 80% rather than the 43% the survey showed. Straining the interpretation of the survey so heavily against the prosecution on this contradictory explanation shows strong bias in favor of the defense.

Similarly, Dr. Bronson states in his declaration that the not guilty result in the survey of 27% is not to be believed because had respondents been given a lesser included offense to the murder question in the survey, the true and more accurate response for prejudgment of not guilty would have been closer to 1% or 2%. (Exhibit 1, to the declaration of Michael Rains; see Bronson declaration at pp.25-28.). In stating this opinion Dr. Bronson fails to explain why he left this critical lesser offense question out of the survey that he wrote. Asking the court to ignore the clear survey results which favor the prosecution and instead accept unsupported speculation that favors the defense shows bias.

E. Finally, neither Dr. New in his testimony nor Dr. Bronson in his declaration acknowledged divergent opinions within their social science community on the issue of whether it is appropriate to include in the survey a question about whether jurors can set aside their prejudgments and be fair. Such differences of opinion in this area of the study of potential juror behavior clearly exist. Dr. Bronson certainly has first hand familiarity with these debates. (***See People v. Davis*** (2009) 46 Cal.4th 539, 569-573 [extensive discussion of the differences of opinion between the court's expert, the prosecution expert and the defense expert, Dr. Bronson, in the area of prejudgment behavior by various potential jury pools; all three experts, including Dr. Bronson, used "set aside" questions in their respective surveys].) This court is mindful that Dr. New asked for expert qualification in this court in part based on his familiarity and knowledge

of California case law on venue. Accordingly, this court presumes that Dr. New was aware of the 14 page discussion by the California Supreme Court in this major venue case featuring Dr. Bronson, which was published just three months ago.

Dr. New testified that a "set aside" question would be a leading question and that he would never consider putting such a question in a survey. He also stated that such a question would require too much verbiage and might lead to respondents terminating the survey early. Dr. New also testified that a "set aside" question was problematic in voir dire because jurors will not be honest due to racial pressures in the case. Dr. New omitted from his testimony that his mentor, Dr. Bronson, previously has used the "set aside" question in justifying the need to change venue.

In his declaration, Dr. Bronson omits any discussion about the possibility of using a "set aside" question when addressing the issue of prejudgment in the survey. This omission is striking; obviously, a "set aside" question is highly relevant to this critical issue. Answers to this question might well have altered the basis for his conclusion that potential African American jurors cannot be fair. Instead, he focused on the racial divide that the survey revealed in the open ended questions. (Exhibit 1, to the declaration of Michael Rains; see Bronson declaration at pp.25-28.). It is disturbing that Dr. Bronson decided not to ask the question when he designed the survey, well ***before*** he got the answers that he uses to justify his opinion African Americans in Alameda County cannot be fair.

Similarly, in his discussion of the inadequacy of voir dire, Dr. Bronson attacks the use of a "set aside" question to assure a fair trial. (Exhibit 1, to the declaration of Michael Rains; see Bronson declaration at p. 33.). Dr. Bronson makes no mention of the fact that in another exceptionally high profile case, which did not involve racial issues, he used the "set aside" question presumably because it suited his purpose in seeking to justify venue change. (***See Davis, supra***, 46 Cal.4th at 572.)

These opinions by the defense experts are troubling. The defense view is that the potential racial dynamics in this case not only require a change of venue, but also justify disparate treatment of potential African American jurors in the voir dire process. (Defense opening brief at pp. 6-10; 61-69; Defense reply brief at pp. 20-22.) Both experts eagerly parrot the defense view and conclude that African American jurors in particular, cannot be fair[3]. However, the nexus between refusing to ask the "set aside" question in the survey and racial attitudes is not readily apparent. In the absence of sufficient analysis to support these opinions that appear to be designed to justify race based exclusion of potential jurors, it appears that both experts simply are providing a rationale that is tailored to allow the defense an opening to subvert the Constitutional limitations on the use of peremptory juror challenges. These opinions are therefore biased.

At least one other published opinion has noted that Dr. Bronson has been found to be biased in favor of changing venue. (***See People v. Pride*** (1992) 3 Cal.4th 195, 225-226.) Based on the findings described above, the trial court's conclusion in ***Pride, supra***, about Dr. Bronson's bias is understandable.

13. Alameda County has a population of approximately 1.5 million people. It is the seventh largest county in California. Alameda County is predominately metropolitan and urban in nature.

14. The status of the defendant is that he was a BART police officer. He was a certified, uniformed and armed member of a transit police force, with the authority

[3] It is noteworthy that Dr. New testified that if a lesser included offense question had been asked in the survey that the true guilt prejudgment rate would have been about 80%, which is very close to 78.4% rate for prejudgment for guilt rate attributed to the small number of African Americans who were surveyed. Similarly, Dr. Bronson opines that the true prejudgment rate for not guilty is around 2%, a percentage that is very close to the 5.4% rate for not guilty among African Americans polled that the survey shows. Ignoring these points in the survey and in their opinions, both experts nevertheless support the defense view that African American jurors are unable to be fair.

and duty to enforce the law in multiple jurisdictions in the Bay Area. Defendant was not a person of any particular notoriety before this homicide. Since this event he has become well known as the police officer who shot the unarmed man on the train platform.

15. The status of the victim, Oscar Grant, before his death is that he was a local citizen unknown beyond his circle of family, friends, acquaintances and co-workers. Since this event, Grant has become well known as the victim in this case. He is now a symbolic figure in the political controversy surrounding police violence. It is common in Alameda County to see Grant's name, photo or likeness on T-shirts, posters, flyers or graffiti.

16. The intensive wide spread press coverage of this homicide has included a component related to public office holders. Numerous elected officials have injected themselves into this case. Oakland City Councilwoman Desley Brooks and Alameda County Supervisor Keith Carson described what they saw on the video as an execution. Oakland Mayor Ron Dellums publicly urged the court not to grant bail to defendant because his release on bail might cause more riots. (Exhibit 11 to the declaration of Michael Rains.) Then, more than a week before bail was posted, Dellums inexplicably issued a press release erroneously stating that defendant had been released from custody.

The elected BART Board of Directors have issued public apologies for defendant's conduct. They have called for the resignation of the BART police chief and BART's General Manager. In August, 2009, the BART police chief announced his retirement. Some news reports described it as a tendering of his resignation and linked it to this case. (Exhibit 11 to the declaration of Michael Rains.)

Attorney General Jerry Brown publicly questioned why then-District Attorney Tom Orloff was taking so long to file charges. Attorney General Brown

announced that he was dispatching a high level aide to Orloff's office to observe the local prosecutor's decision making process and to speed things along. State Assemblyman Sandre Swanson, chairman of the Black Legislative Caucus, complained about the slow pace of the filing of charges. Additionally, Swanson and another legislator introduced a bill to create an oversight board for the BART Police Department. (Exhibit 11 to the declaration of Michael Rains.)

Congresswoman Barbara Lee urged the filing of charges on the local level. Rep. Lee also stated that she would push for a federal civil rights prosecution if prosecution was not undertaken by the District Attorney. Congresswoman Lee was quoted as saying she was pleased when charges were filed and defendant was arrested and that she would continue to work to insure that justice is served. (Exhibit 11 to the declaration of Michael Rains.)

17. Similarly, significant press attention has been given to prominent religious leaders in the local community. The Rev. Alfred Smith of the Allen Temple Baptist Church, the Rev. Lawrence Van Hook of the Community Christian Church and Minister Christopher Muhammad of the Nation of Islam all offered opinions reflecting the outrage in their congregations about this case. (Exhibit 11 to the declaration of Michael Rains.)

18. Well known, long established and respected civil rights organizations have been given a voice in this case by the press. The Rev. Amos Brown, president of the San Francisco chapter of the NAACP, and Alice Huffman, the state president of the NAACP called for murder charges to be filed based on their review of the video evidence. Amnesty International and the Meiklejohn Civil Liberties Institute described defendant's actions in this case as proof of racial profiling and police brutality. (Exhibit 11 to the declaration of Michael Rains.)

19. Well known local legal commentators have been given extensive press coverage. Long time prominent civil rights lawyer John Burris, who has for many years been a featured legal commentator on local television news programs and has often been quoted in the newspapers and on the radio, was retained to represent the victim's family in this case. Burris has been a frequent opinion source in many of the printed and broadcast stories in this case. His views have been highly partisan and antagonistic towards defendant and defense counsel, and at times, towards the prosecution and the courts. (Exhibit 11 to the declaration of Michael Rains.)

The media has often quoted others with some special expertise about additional reasons supporting defendant's guilt. Former San Francisco County prosecutor and current television commentator Jim Hammer has been cited in the press as a legal expert who thinks defendant is guilty. Law school professors and police use of force experts have been featured in articles. Further, news coverage was given to Bobby Seale, a founding member of the Black Panther Party, on his conclusion that defendant is guilty. (Exhibit 11 to the declaration of Michael Rains.)

Prominent newspaper columnists have written stories about this case. In the San Francisco Chronicle, the most widely read newspaper in the area, Chip Johnson, and Jon Carroll have all written columns about this case. In the Oakland Tribune, columnist Tammerline Drummond has weighed in with her opinions on more than one occasion, including recently offering her voice on how this venue motion should be decided. (Exhibit 11 to the declaration of Michael Rains.)

20. There have been many, many protests related to this case. Some have occurred in downtown Oakland, others at BART train stations or Board of Director meetings, another occurred at the Wiley Manual Courthouse in Oakland at defendant's arraignment and many protests have occurred at the Rene Davidson Courthouse in Oakland where this case has been assigned since the arraignment. (Exhibit 11 to the declaration of Michael Rains.)

The protest activity was so loud on one occasion that it interrupted the bail hearing in this case. On another occasion, angry protestors literally packed the lobby, wall-to-wall, outside of the District Attorney's Office in this Courthouse. The Courthouse protest activity often has been focused on the entrance to the Courthouse such that ingress and egress require passing through or immediately adjacent to the activity. At other times protestors have gathered in the lobby area outside of the courtroom where proceedings are being heard. Other protests have been held on the front steps of the Courthouse and in the plaza between the Courthouse and the County Administration building. This court has personally observed at least 12 protests at this Courthouse. Most recently, this court witnessed two protests on October 6, and October 7, 2009, which were held on the days that the venue hearing was being heard.

Some of the protest activity has been generated by a series of groups that are concerned with police violence towards minority groups in particular. Based on the content of their protest activity, on information in their websites, and in statements made in the press, members of some of these groups appear to be committed to maintaining a visible and vocal presence at all court proceedings in Alameda County to "insure justice for Oscar Grant". (Exhibit 13 to the declaration of Michael Rains.) This stated intent to continue protests throughout the trial is a credible promise based on their behavior over the last nine months.

21. In this case, a series of death threats have been received. The attorney who first represented defendant before attorney Rains entered the case reported to this court in mid January 2009 that death threats had been received by the attorney and also by defendant. It was also reported that threats had been made against defendant's newborn child. When Rains entered the case in late January 2009 he too reported that he received death threats on his law office answering machine. Rains provided a recorded copy of those threats to this court at that time. In February 2009, defendant's parents were subjected to bomb threats at their family

home in Napa County on two occasions. (Exhibit 11 to the declaration of Michael Rains.)

22. The intense political activity related to this case has unfortunately been marred by violence on several occasions. On at least three occasions violence erupted during protests in downtown Oakland. On the first of these occasions, a full scale riot resulted. Police cars were damaged and set afire. More than 100 storefronts to businesses downtown were damaged and vandalized. More than 100 people were arrested. Smaller scale violence occurred in at least two later marches in the downtown Oakland area. Less property damage and fewer arrests occurred. (Exhibit 11 to the declaration of Michael Rains.) This court now has a series of felony cases pending before it resulting from this series of protests that turned violent. Charges include arson, felony vandalism, and assaults on police officers.

On two occasions attempts were made to shut down the Fruitvale BART station, which was where this incident occurred. On one occasion the station was shut down for a period of time and some arrests were made. On another occasion, the shut down of the train station did not succeed. (Exhibit 11 to the declaration of Michael Rains.)

In January 2009, BART cancelled a planed Martin Luther King celebration due to threats of violent protest. In April 2009, protestors threw paint on BART's General Manager at a BART Board of Directors meeting. (Exhibit 11 to the declaration of Michael Rains.)

23. Courthouse security issues have been significant. At the arraignment in this case, a large and angry protest was aimed at the Wiley Manual building. A series of special security measures were taken to protect defendant, his family, his attorneys and court staff. This appearance was followed by a bail hearing at the Rene Davidson Courthouse. More than 20 Sheriff's Deputies were needed to provide safety for the participants. Since defendant made bail and has been out of

custody, special measures have been taken each time he enters and exits the building. Each appearance has required planning and coordination between the court and the Sheriff's Department to increase the chances of conducting the proceedings safely and while also providing hearings open to the public.

The court also has had to make special accommodations and schedules to account for the public furor related to this case. On at least four occasions juries have been sent home early due to reports of planned protests. During the preliminary hearing, courtrooms on the same floor as this case were shut down and juries, judges and court staff were moved to other floors to insulate those trials from the disturbance of this case. The preliminary hearing was held at special times to lessen the disruption to other courts in the building. The preliminary hearing was recessed on a Thursday so that the public anger that accompanies this case would not spoil a long planned "Law Day" for high school students. Courthouse employees often express concern about their personal safety and about possible property damage when this case has proceedings.

24. Following a month of protests, civil unrest and repeated riots in the City of Oakland, Oakland Tribune columnist Tammerlin Drummond wrote: "How can you possibly have a free and fair trial when people are swinging from lamp posts outside the courthouse, ranting about killer cops and threatening to take matters into their own hands if Mehserle is not convicted of murder? What sane potential juror wouldn't be terrified at the mere prospect of having to walk past that every day?" (Defense opening brief at p.3.) In this column, Drummond articulated the court's deepest concern and captured the essence of the greatest threat to providing defendant a fair trial.

Following a series of death threats and bomb threats directed toward defendant, his family and defense counsel, this court issued a restraining order on the attorneys in this case in February 2009, after defense counsel Rains delivered an unfiled copy of his bail motion to the San Francisco Chronicle in advance of

the bail hearing. The defense named about 15 citizen witnesses in this motion and described them as favorable to the defendant. Rains delivered this list of named witnesses to the press before this court could take any action to protect those witnesses from threats and intimidation. One of those witnesses is a court employee.

Over the months that followed the bail hearing, this court heard from a number of employees about their concerns for their colleague and her husband after they had been publicly identified. Thus, this court knows witnesses in this case are truly frightened by the violence, civil unrest, and the death threats that have been directed at anyone in the path of this case.

Without a doubt, potential jurors have the same fears. Defendant's survey shows that 82% of the potential jurors who were polled harbor this fear. The court accepts this proof and finds it to be true.

The corroboration of the reliability of this survey result is everywhere. This court knows from cases pending before it arising out of the riots, from concerns expressed by Oakland Police Officers and members of the Alameda County Sheriff's Department, from courthouse security planning meetings, from conversations with court employees, prosecutors and defense attorneys, and from media reports which are now in evidence, that anyone who lives or works in Oakland is genuinely in fear of more civil unrest and violence. It is foreseeable that these fears may be realized should a jury return a verdict other than "guilty" on the murder charge.

Although the video evidence shows beyond all doubt that defendant Mehserle shot and killed victim Grant, culpability for murder and its lesser offenses also requires proof of a defendant's state of mind. As to this aspect of the case, the evidence appears to be open to a range of possible interpretations, depending on what a jury finds to be true. In this respect, this case may well be a close one and difficult for some or all of the jurors to decide.

This case therefore presents a grouping of factors that foreclose any real hope of insulating the jurors from the pressure of the public outrage in Alameda County. The jurors will likely be making a difficult decision that could go either way. These jurors will be exposed to protestors' angry demand for "justice for Oscar Grant" each time they go in and out of the courthouse, a constant reminder of the impending civil unrest. These jurors also likely will be concerned about the real possibility more riots and violence depending on the verdict they choose.

Under these circumstances, there is a reasonable probability that defendant cannot get a fair trial. This situation is the present reality.

25. Defendant has made clear in his moving papers that he is contemplating disparate treatment in voir dire and systemic exclusion of potential African American jurors in this case. (Defense opening brief at pp.67-69.) Defendant's use of his experts to justify this strategy not only shows their bias, but is plainly disturbing. Systematic exclusion of any cognizable group of jurors, because of a party's prejudgment that there exists a group bias, is wrong.

Nothing in defendant's evidence or arguments in this motion justifies violating the State or United States Constitutions in regard to jury selection. Both the defense and prosecution are entitled to a fair trial, which includes a fairly selected jury. The controlling law, even for this case, continues to be *People v. Wheeler* (1978) 22 Cal.3d 258, 276, and *Batson v. Kentucky* (1986) 476 U.S. 79, 84, and their progeny. The prosecution is entirely correct on this issue: "…to single out African American jurors for this treatment is unwarranted, unprecedented and inappropriate." (District Attorney response brief at p. 13.)

III. CONCLUSIONS OF LAW

1. Standard of Proof

The standard of proof to be applied in ruling on a change of venue motion at this stage of the proceedings is whether "it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (***Penal Code § 1033; Sheppard v. Maxwell*** (1966) 384 U.S. 333, 363; ***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1124; ***People v. Prince*** (2007) 40 Cal.4th 1179, 1213; and ***Powell v. Superior Court*** (1991)232 Cal.App.3d 785, 794.)

"Reasonable likelihood" is defined as less than "more probable than not", but more than "merely possible". (***People v. Vieira*** (2005) 35 Cal.4th 264, 279; ***People v. Jenkins*** (2000) 22 Cal.4th 900, 943; ***People v. Williams*** (1989) 48 Cal.3d 1112, 1126 and ***Powell, supra***, 232 Cal.App.3d at 794.)

Actual prejudice need not be shown. (***Vieira, supra***, 35 Cal.4th at 279; and ***Williams, supra***, 48 Cal.3d at 1125-1126; and ***Powell, supra***, 232 Cal.App.3d at 794.)

Because the prejudicial effect of publicity before jury selection is necessarily speculative, it is settled that any doubt as to the necessity of removal should be resolved in favor of a venue change. (***Vieira, supra***, 35 Cal.4th at 279; and ***Williams, supra***, 48 Cal.3d at 1125-1126; and ***Powell, supra***, 232 Cal.App.3d at 794.)

Defendant bears the burden of proof on this motion. (***Jenkins, supra***, 22 Cal.4th at 943.) Obviously, the defense must do so with reliable and credible evidence. As to the defense expert opinion evidence, however, even despite significant showings of bias on their part, their ultimate conclusion that venue should be changed may still be correct under the totality of the circumstances.

2. The Applicable Test

The trial court typically considers the following factors: 1) the nature and gravity of the offense; 2) the nature and extent of the media coverage; 3) the size

of the county from which the jury pool will be drawn; 4) the status of the accused; and 5) the status of the victim. (***Zambrano, supra***, 41 Cal.4th at 1124; ***Prince, supra***, 40 Cal.4th at 1213; ***Vieira, supra***, 35 Cal.4th at 279; ***Jenkins, supra***, 22 Cal.4th at 943; ***Williams, supra***, 48 Cal.3d at 1125-1126; and ***Powell, supra***, 232 Cal.App.3d at 794.)

If political overtones are present, the Court should consider these as a factor also. (***People v. Hamilton*** (1989) 48 Cal.3d 1142, 1156; ***People v. Williams*** (1983) 34 Cal.4th 584; 594-595; and ***Maine v. Superior Court*** (1968) 68 Cal.2d 375, 387.) More pointedly, if political turmoil has arisen from the incident that is the basis of the charges against the defendant, the existence of such turmoil is a material factor to be considered in determining whether venue should be changed. (***Powell, supra***, 232 Cal.App.3d at 794.)

2. The Nature and Gravity of the Crime Alleged

The crime charged is murder and thus the gravity of the crime is great. Moreover, the crime charged alleges a uniformed on duty police officer murdered an unarmed train passenger in the course of an arrest procedure. Further, the incident is viewed by many as being a case about race relations between the police and minority communities. In essence, this case is an allegation of murder under color of law, inseparably entwined with a broad scale political controversy. This factor, under the rare circumstances of this case, weighs in favor of a change of venue. (***Powell, supra***, 232 Cal.App.3d at 798.)

3. The Nature and Extent of the Media Coverage

The sheer volume of the media coverage is staggering. The saturation of the citizenry of Alameda County is near absolute. It is hard to imagine a person who is reachable by a jury summons who has not been personally deluged by some combination of newspaper, television, radio and internet coverage. In just nine months since this homicide, there have been 2,000 or more newspaper

articles, 2,000 or more television news segments, far more than 350 radio news stories and untold number of internet hits that included downloads that reached one half million by mid January on one television station's website alone.

Moreover, although the intensity has dissipated somewhat since the first month after the killing, the volume of media activity remains very high: the four largest newspapers alone published 70 newspaper articles in the last five weeks; in the last week during which the venue motion was held, at least 20 radio news stories were aired on but one station and multiple television news segments were broadcast. Thus there is no dissipation through the lapse of time that weighs against a change of venue. (***See Jenkins, supra***, 22 Cal.4th at 944.)

Although the media coverage has not been particularly sensationalized or prejudicial, the survey evidence in this case shows that more than 70% of potential jurors have prejudged defendant's guilt or innocence already. The defense experts credibly opine that this high level of prejudgment occurs where the survey respondents have been saturated with detailed knowledge about the case. The survey shows that is precisely what has occurred in Alameda County.

This court is mindful that it would be an impossible standard to meet to require impanelment of a jury untouched by pretrial publicity, and that there is no requirement that potential jurors be ignorant of the news accounts of the crime or free of any preconceived notions as to guilt or innocence of the accused, (***Davis, supra***, 46 Cal.4th at 575 and 580, ***citing People v. Harris*** (1981) 28 Cal.3d 935, 949-950; and ***Irwin v. Dowd*** (1961) 366 U.S. 717, 723). Nevertheless, it appears that this high volume of publicity, combined with the upsetting nature of the accusation of an on-duty uniformed police officer murdering an unarmed train passenger and the extraordinary level of political turmoil attached to this incident, makes it reasonably probable that defendant cannot get a fair trial in this County. Accordingly, this factor weighs in favor of changing venue.

4. The Size of the County

Where a county is large in population and metropolitan in character, this factor weighs heavily against a change of venue. (***People v. Pride*** (1992) 3 Cal.4th 195, 224.) More than one case has found that the large size and urban nature of Alameda County was a factor that weighed heavily in the proper denial of a defendant's change of venue motion. (***See Zambrano, supra***, 41 Cal.4th at 1124; and ***People v. Welch*** (1999) 20 Cal.4th 701, 744-745.)

The key is whether the population is of such a size that it neutralizes or dilutes the impact of adverse publicity. (***Prince, supra***, 40 Cal.4th at 1213-1214.) Thus, even in the State's largest county, Los Angeles, venue change may be required if enough of a threat to defendant's right to a fair trial is shown in the analysis of the other factors. (***Powell, supra***, 232 Cal.App.3d at 794-803.)

Here, despite Alameda County's large size and metropolitan nature, the court is not confident that this factor has overcome the avalanche of pre-trial publicity or the intensity of the community outrage such that it can be said that the adverse impact on the fair trial has been neutralized or diluted. Accordingly, this factor does not weigh heavily against a change of venue

5. The Status of the Defendant

The status of the defendant may have a prejudicial effect on his right to a fair trial where it is publicized that he is not a local resident, is a known criminal or drug addict, a member of a group that arouses hostility or a member of a minority community (***See People v. Fauber*** (1992) 2 Cal.4th 792, 818; ***People v. Adcox*** (1988) 47 Cal.3d 207, 233; ***Williams, supra***, 34 Cal.4th at 594.) Racial differences between defendant and the victim can increase the difficulty in having a fair trial. (***See Jenkins, supra***, 22 Cal.4th at 944; ***Williams, supra***, 48 Cal.3d at 1129-1131; ***Williams, supra***, 34 Cal.4th at 594 and ***Powell, supra***, 232 Cal.App.3d at 794.)

Most relevant to this case, where the defendant holds the trusted status of a law enforcement officer, and is accused of violating that trust in the commission of a heinous crime, a fair trial locally may be unobtainable as a result of the extreme publicity and the high level of public anger. (***Powell, supra***, 232 Cal.App.3d at 798.)

The defendant in this case was a relatively unknown and obscure BART police officer who had been so employed for a little more than a year. Since the homicide, however, defendant has become extremely well known in this County and in the San Francisco Bay Area. Without a doubt, his status as a Caucasian police officer who shot and killed an unarmed African American detainee has lead to intense and sustained media interest. Well over 4,000 media stories have mentioned this police officer defendant in the nine months since the homicide. The video footage showing the homicide has been played in the mainstream media repeatedly and on a widespread basis. More than 500,000 downloads of this video have occurred on the internet.

The words of the Court in ***Powell, supra***, apply with equal force here: "[i]t cannot be disputed that difficulty in obtaining a fair trial in Los Angeles County is exacerbated by the fact the defendants are police officers, sworn to protect citizens, to uphold the law and to maintain peace in the community. Their status is the basis of the intense coverage and repeated showing of the videotape. The fact that the videotape depicts local officers in such conduct threatens the community's ability to rely on its police and has caused a high level of indignation, outrage, and anxiety." (***Powell, supra***, 232 Cal.App.3d at 798.)

Defendant's status as a police officer is a factor that weighs heavily in favor of a venue change.

6. The Status of the Victim

The victim in this case, Oscar Grant, was a young citizen who was relatively unknown beyond his family, friends and acquaintances. As a young African American man who was killed at the hands of a uniformed Caucasian police officer during a detention and arrest, he has acquired posthumous fame and is now a symbol of widespread political controversy in this County. The fact that his killing was captured on video and there has been widespread dissemination of that footage, has greatly raised his profile in the minds of the residents of Alameda County. (***See Powell, supra***, 232 Cal.App.3d at 798.) As a result, he has been personified, humanized and cast in a sympathetic light since his death. (***Cf. Hamilton, supra***, 48 Cal.3d at 1159-1160 ["The publicity surrounding the trial did nothing to …personalize the victim. As a result, the jurors do not appear to have had a stake in the outcome of the trial, and the likelihood that defendant was deprived of a fair trial is correspondingly diminished."].) These circumstances, which are the opposite of those described about the victim in ***Hamilton, supra***, favor changing venue.

7. Political Activity Related to this Case

With the exception of ***Powell, supra***, no published case in California, and no case in this court's memory has stimulated either the breadth or the depth of political activity that has been present in this case. Local, state level, state-wide and national level elected politicians have pushed their way into the debate about this case. Public apologies from the elected BART Board of Directors have been issued. That same Board has called for the ouster of the BART police chief, who has now announced his retirement. Civilian review of the BART Police Department has been called for by community groups, elected politicians and is now the subject of legislation in Sacramento. Independent outside review of the BART Police Department was contracted out to an independent law firm and separately, to the National Organization of Black Law Enforcement officials.

Both entities have submitted well publicized reports that are highly critical of the BART Police in general and of their actions in this homicide incident in particular.

Local religious leaders, legal commentators, and quotable experts have had their say, for the most part highly critical of defendant. Internationally and Nationally known civil rights groups have called for full and prompt prosecution of defendant in this case. Community groups have rallied against defendant in the press, on websites and in protests in the streets and at the courthouse. These protests have been vocal, intense, angry and frequent. Sometimes the groups of protestors are small, as few as 15 or 20 people; on other occasions hundreds and hundreds of people have come together to express their anger at defendant.

On at least three occasions these protests turned violent and resulted in riots. Police cars were set afire, more than one hundred businesses suffered broken windows and other damage to their storefronts and many rioters were arrested. A group of felony cases are now pending before this court as a result of this civil unrest.

All of this political activity related to this case has been voluminously documented by the media in a large portion of the more than 4,000 articles, stories, segments and editorials that have been published since the first of this year. Political factors have no place in a criminal proceeding; when they are likely to appear, they constitute an independent reason for a venue change. (***Williams, supra***, 34 Cal.4th at 594; ***Maine, supra***, 68 Cal.2d at 387; and ***Powell, supra***, 232 Cal.App.3d at 800.)

The high level of political activity and controversy which this case has generated has continued from the date of the incident up through the change of venue motion. Protestors have been widely quoted in the media in the last week stating that they intend to maintain their activities and presence at the courthouse in an effort "to see that justice is served". Thus, it appears likely, to the point of a near certainty, that the political turmoil and controversy attached to this case will continue through the date that trial is scheduled in less than one month and until

the trial is completed. At least some jurors are sure to be frightened, intimidated and influenced by this atmosphere. This intense political activity and local turmoil that is now, and has been, an ever-present part of this case, is a factor weighing very heavily in favor of a venue change. (***Powell, supra***, 232 Cal.App.3d at 790.)

8. Conclusion

In conclusion, all of the above factors favor change of venue save one, the size and nature of this County. That factor, alone, does not persuade the court. Pursuant to California Rule of Court 4.151(b), this Court has considered the option of first impaneling a jury before deciding whether venue should be changed. The court finds that the totality of the circumstances in this case include, in particular, the rare nature and gravity of a murder charge arising out of an on duty uniformed police officer killing an unarmed man during an arrest, the high degree of political turmoil associated with this case, and the resulting avalanche of intense, continuing and current media attention.

Under this totality of circumstances, the court finds that impaneling a jury first, as suggested by Rule 4.151(b), would not change the merits of analysis of the factors set forth in this order. Instead, impaneling a jury before rendering a decision on venue change would likely result in substantial delay of the trial, and result in increased and unnecessary expense for the parties and the court. Further, impaneling a jury first would surely stimulate the intensity of the political turmoil and the accompanying media attention. For these reasons, the court rejects the option described in Rule 4.151(b).

V. THE ORDER

Under Penal Code § 1033 and the case law cited in this order, defendant has met his burden of showing there is a reasonable probability that he cannot get

a fair trial in Alameda County. Accordingly, defendant's motion to change venue must be **GRANTED**.

The court will advise the Presiding Judge to notify the Administrative Director of the Courts pursuant to California Rule of Court 4.152. The parties shall be contacted by the court's clerk about scheduling further proceedings related to selecting the receiving court. The current trial date of November 2, 2009, is to be maintained until further order of this court.

It is **SO ORDERED**.

DATED: October 16, 2009

HON. MORRIS JACOBSON
JUDGE OF THE SUPERIOR COURT