#152.

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CRIMINAL #2013-983



COMMONWEALTH OF MASSACHUSETTS

v.

AARON HERNANDEZ

**DEFENDANT AARON HERNANDEZ'S REPLY TO COMMONWEALTH'S OPPOSITION TO DEFENDANT'S MOTION FOR A CHANGE OF VENUE**

**Introduction**

In what can only be described as a rote and formulaic collection of strained and demonstrably unoriginal arguments, the Commonwealth opposes Defendant Aaron Hernandez's well-founded Motion for a Change of Venue. Without offering any countervailing evidence of its own, the Commonwealth, claims the case at bar is not one that presents the "truly extraordinary circumstances" that warrant a change of venue. This is the same Commonwealth whose agents, acting under the faceless cover of "law enforcement sources," once generated so much adverse publicity about the Defendant that this Court entered a so-called "gag order" in February to protect the Defendant's right to a fair trial. The numerous flawed and groundless assertions contained in the Commonwealth's Opposition require a brief reply.

**A. Hernandez Has Never Claimed that He is Entitled to a Jury that is "Wholly Unaware" About His Case; Under Established Case Law, He is Entitled to a Jury Pool that is Not Presumptively Prejudiced Against Him as a Result of an Onslaught of Pervasive and Adverse Pre-Trial Publicity**

No doubt mindful of the damage that has been caused by the extraordinary adverse publicity that has poured into Bristol County, in its Opposition, the Commonwealth first raises a straw man argument that Hernandez is seeking a jury panel that is completely unaware of his case or ignorant of the incessant press coverage directed at it. Hernandez has never made this argument. The focus of the Defendant's motion for a change of venue is the presumptive bias of the jury pool in Bristol County, a direct result of the unprecedented and sensational pretrial publicity that has targeted Hernandez. Under Commonwealth v. Hoose, 467 Mass. 3395 (2014) and other precedent, the Supreme Judicial Court has definitively ruled that prejudice justifying a change of venue may be inferred from extensive pre-trial publicity or settled community opinion. Id. at 405-406. Mindful of his burden, Hernandez has proffered powerful evidence of both. Hernandez does not seek an oblivious jury, only a fair jury drawn from a pool in which approximately two-thirds of the members are already convinced of his guilt. See Memorandum of Law in support of Defendant's Motion for a Change of Venue at 11-12. As the telephone polls conducted for the Defendant demonstrate, due to pre-trial publicity the likes of which have perhaps never been seen in Massachusetts, a deep and objective jury pool simply does not exist in Bristol County. See Declaration of John Della Volpe and Supplemental Declaration of John Della Volpe.

**B. The Argument that Requests for Changes in Venue Are Rarely Granted and Thus Hernandez's Motion Should Not Be Granted is No Argument At All**

The Commonwealth implores this Court to turn aside Hernandez's motion to change venue by claiming that requests for a change of venue are rarely granted. Commonwealth's Opposition at 3. Without proffering any compilation of data from Massachusetts to support this

contention, or attempting to distinguish the 2012 *Dwayne Moore* decision from Suffolk County that was submitted with the Defendant's motion, or address other instances when courts have exercised their discretion to grant some form of venue relief[1], the Commonwealth simply proclaims that granting a change of venue is an "extraordinary rarity." Id.

This superficial and unsupported argument is of no moment. Whether the Commonwealth agrees or not, in Massachusetts, "prejudice against the defendant sufficient to preclude a fair and impartial trial may exist because the entire jury pool is tainted by exposure to pre-trial publicity." Commonwealth v. Toolan, 460 Mass. 452, 463. Accordingly, each case in which a change of venue is sought presents a unique set of circumstances that must be examined by a court. Even if relief may be rare, this does not lead to the conclusion that it is never appropriate. After all, one could also claim that it is also an "extraordinary rarity" for a court to impose an extensive pre-trial gag order on the Commonwealth (and the defense), but so it is in the instant case. Indeed, it was the repeated efforts by nameless "law enforcement sources" and "sources close to the investigation" to plant the seeds for adverse media coverage of Hernandez that led this Court to take the rare step to impose such an order. While the gag order may have brought a halt to the incessant leaks from law enforcement, the extraordinary and sensational pre-trial publicity persisted in a manner that created the exceptional case that warrants a change in venue.[2]

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[1] See e.g., Commonwealth v. Gaynor, 443 Mass. 245, 259 (2005).

[2] Ironically, after the publication of damaging leaks for months and then first opposing, and then appealing this Court's gag order to a Single Justice of the Supreme Judicial Court, the Commonwealth boasts in its Opposition that this Court has not identified a "single violation" of the gag order, as if compliance with an order that basically codifies the Rules of Professional conduct is a badge of honor that militates against granting a change of venue. Commonwealth's Opposition at 5. The Commonwealth's illogical argument conveniently overlooks the fact that it was the behavior of their agents that descended to a level requiring the imposition of the gag order by this Court in the first place. Moreover, by stopping the leaks from law enforcement sources, the gag order only addressed one source of pre-trial publicity that has corrupted the community.

**C. The Commonwealth Completely Misapprehends the Concept of "the Boston Media Market" and Introduces an Erroneous Definition in a Desperate Attempt to Deny the Obvious**

In a statement that requires one to suspend rational thought, the Commonwealth asserts:

> "[o]ne factor muting the media impact on the case is that, notwithstanding the defendant's incorrect suggestion to the contrary, Bristol County is not, in fact, in the Boston Television Market Area ('TMA')(Boston media market) as defined by the Federal Communications Commission. See 47 CFR § 76.51. In fact, Bristol County is located within the FCC's defined Providence-New Bedford TMA.

Commonwealth's Opposition at 6.

This revelation about "the TMA to which Bristol County has been assigned," Opposition at 6, footnote 3, must come as a surprise to the residents of Bristol County. Residents of the county are not in the Boston media market? Really? A resident of North Attleboro cannot view Boston-based Fox 25 News or WHDH's 7 News in New England? A resident of Dartmouth cannot view WCVB Channel 5 or WBZ Channel 4? Under the FCC regulation found by the Commonwealth, are residents of Bristol County barred from receiving the Boston Herald or the Boston Globe? Does the FCC block the transmission of Boston-based radio news, radio talk shows and sports talk from Bristol County?

The answer to each of these inquiries is of course "no." The regulation cited by the Commonwealth has nothing to do with the true state of the media's reach in Southeastern Massachusetts. In fact, the "TMA to which Bristol County has been assigned" by the Federal Communications Commission is about as relevant to this case as the gardening zone to which Bristol County has been assigned by the U.S. Department of Agriculture.

The Commonwealth never discloses the purpose behind the federal regulation it touts. The regulation relates to the "carriage of television broadcast signals" by cable television companies. See Subpart D – carriage of Television Broadcast Signals, 47. C.F.R. § 76.51. The regulation itself begins by stating: "For purposes of the cable television rules...." Id. The true

purpose and meaning of FCC regulation is to identify the content subject to the Commission's "must carry" provisions for cable providers. As part of the Providence – New Bedford Television Market Area ("TMA"), cable providers must carry the programs broadcast through signals originating in Providence and New Bedford. As such, the regulation cited by the Commonwealth has no bearing on the Boston broadcast media's ability to reach the Bristol County population. Indeed elsewhere, the FCC has published maps showing the licensed broadcast footprint of all the Boston network-affiliated television stations, both analog and digital. As anyone grounded in reality might expect, these defined areas easily encompass the entirety of Bristol County.[3] These maps are available from the FCC website:

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[3] Convinced they have found the magic bullet in an obscure and quite inapposite FCC regulation, the Commonwealth "notes" that one of the alternative venues suggested by Hernandez in his motion , Worcester County, is "in fact, in the Boston TMA." Opposition at 6, fn. 4. Clearly, the Commonwealth has become so enamored with its meaningless regulatory find, it advances the "TMA" regulation as a basis for a bevy of arguments. In so doing, however, the Commonwealth merely closes its eyes to the true, logical and accurate concept of a "Boston media market," as that term is used by the Defendant in his motion and as used by at least one Superior Court Judge of the Commonwealth who was confronted with a serious motion for a change of venue. In Comonwealth v. Dwayne Moore, Superior Court Crim. No. 2011-10023 (Suffolk County 2012), Exhibit 22 to the Affidavit of Michael K. Fee in Support of Defendant's Motion for a Change of Venue, Judge Gaziano employed a common sense definition of the Boston media market when he responded to the defendant's motion to change venue by bringing jurors from Worcester County to Suffolk County. Explaining the basis for using a Worcester County venire, Judge Gaziano reasoned that the county was on the fringes of the Boston media market without referring to any FCC regulation:

> Worcester County lies at the center of the state, spanning from Connecticut on its southerly border to New Hampshire on the north, the jury pool is drawn from 54 cities and towns, many likely outside the peak subscription region of the Boston daily papers, and probably less focused on television news coverage of Boston cases or trials.
>
> The largest county in Massachusetts is Middlesex County with a population in excess of 1.5 million. However, many of the communities of Middlesex County are geographically close and well within the reach of the Boston media market.

Moore, supra, at 5 and note 4.

http://transition.fcc.gov/dtv/markets/maps_current/Boston_MA.pdf. In sum, it is obvious that Bristol County is within the reach of Boston-based media outlets, among others. The regulation cited by the Commonwealth is completely irrelevant to an analysis of the prejudicial media coverage in this case.

**D. Contrary to the Commonwealth's Strained and Understandably Incomplete Argument, Bristol County's Size Militates in Favor of a Change of Venue Not Against**

Applying its own version of the factors enumerated in Toolan, the Commonwealth claims the Bristol County is "significantly larger than regions in which pretrial publicity has previously provided a predicate for a change of venue." Opposition at 7. In support of this declaration the Commonwealth offers only one case, Rideau v. Louisiana, 373 U. S. 723 (1963) where the jury pool would be drawn from a population of approximately 150,000. Then, paraphrasing a passage in Skilling v. United States, 561 U.S. 358, without ever referencing the size of the jury pool that was critical to the reasoning employed by the Supreme Court in that case, the Commonwealth states, "Given th[e] large, diverse pool that was of potential jurors [in Bristol County], the suggestion that [sixteen] impartial individuals could not be empaneled is hard to sustain." Opposition at 7 quoting Skilling, 561 U.S. at 381 (alterations in original).

In Skilling, the jury pool was comprised of 4,500,000 people in greater Houston, Texas. In the recent decision denying a change of venue in the federal prosecution of the accused Boston Marathon Bombe Dzhokhar Tsarnaev, the court reasoned that the jury pool in the Eastern Division of the District of Massachusetts was comprised of about 5,000,000 people. In stark contrast, Bristol County is comprised of approximately 500,000 people, of whom perhaps 350,000 are eligible to serve on a jury. Accordingly, the juror pool of Bristol County is far closer to the greatly limited 150,000-person jury pool in the Louisiana parish at issue in Rideau where a change of venue was granted. The relatively small size of the jury pool in Rideau was

instrumental to the Supreme Court's finding of presumed juror prejudice in that case. There is simply no basis for comparison between the available jury pool in Bristol County and a jury pool of 4.5 million people in Houston. Accordingly, the Commonwealth's attempt to analogize the two is absurd.

**E. The Commonwealth's Attacks on the Telephone Opinion Survey are Ineffective**

Borrowing heavily, indeed copying verbatim without attribution many of the same arguments directed against the telephone surveys conducted in the *Tsarnaev* case, the Commonwealth attempts to discredit the results of the poll. Offering no countervailing evidence of its own, the Commonwealth simply snipes at the poll, claiming that it suffers from one defect or another. The Commonwealth's unoriginal and unfounded contentions should be ignored.

The Defendant has submitted the findings of two telephone surveys of Bristol County residents to this Court, one conducted using the Listed Sample methodology and one conducted using Random Digit Dialing methodology, filed with this Reply. See Declaration of John Della Volpe and Supplemental Declaration of John Della Volpe. Both surveys were professionally constructed and executed. Both surveys generated similar results: a large cohort of potential jurors have pre-judged Hernandez's guilt. (2 out of 3 in the most recent survey). Media has been a prominent source of information for these potential jurors with the most recent poll revealing that 89% of the respondents relied on perhaps the most sensational of all coverage, television news.

The Commonwealth's attempt to identify deficiencies in the polling is wholly unsuccessful and in many instances, reveal either ignorance of polling principles and how telephone polls are constructed, or shopworn arguments directed at telephone polling generally. Hurling invective like "misrepresents," "defects," "distortion," references to unidentified "reputable pollsters" and "obvious flaws" is no substitute for the Commonwealth's fundamental

lack of understanding or focus on irrelevant details. For example, the Commonwealth faults the pollster for not drilling down with additional questions when a respondent stated they were not registered to vote. See Opposition at 14, fn. 10. Apparently the Commonwealth is unfamiliar with Mass. Gen. Laws Chapter 234A, Section 4, which provides that

> [a]ny citizen of the United States who is a resident of the judicial district or who lives within the judicial district more than fifty per cent of the time, whether or not he is registered to vote in any state or federal election, shall be qualified to serve as a grand or trial juror in such judicial district....

Id. (emphasis added). The statute then lists the very limited grounds for disqualification from juror service in Massachusetts, which include suffering from a "mental disability." Id. at Section 4.4. Should the pollsters have asked each unregistered voter who responded to the survey whether they also suffered from a mental disability?

The Commonwealth spends most of its ink haughtily attacking the response rate in the survey, claiming to have uncovered numerous defects. The Commonwealth, however, either misapprehends or misrepresents the methodological challenges of a telephone survey, as demonstrated by the very authority on which they claim to rely. For example, with regard to the response rate and field period of the Defendant's survey, the Commonwealth claims that these do not comport with proper survey methods and therefore is unreliable. Yet, in support of their argument, the Commonwealth refers the Court to statements by the American Association for Public Opinion Research (AAPOR). Opposition, 16 n.15. This AAPOR document entitled "Response Rate – An Overview," actually provides support for several aspects of the Defendant's Survey that the Commonwealth intends to criticize. For example, the publication states that there are at least six different, legitimate and distinct, methods by which one could compute a response rate for a survey. Moreover, the AAPOR document states that in recent years, response rates to surveys have dropped greatly, "in some cases precipitously." The

document goes on to state that experimental reviews comparing survey estimates to U.S. census benchmark data have found little support for a strong positive correlation between response rate and accuracy:

> Results that show the least bias have turned out, in some cases, to come from surveys with less than optimal response rates. Experimental comparisons have also revealed few significant differences between estimates from surveys with low response rates and short field periods and surveys with high response rates and long field periods.

Id. The findings of this professional organization stand in stark contrast to the unsupported pronouncements accompanying the amateur analysis employed by the Commonwealth which states: "The notion that low response rates might produce unreliable results is only a matter of common sense...." Commonwealth's Opposition at 15. Contrast http://www.aapor.org/Response_Rates_An_Overview1.htm.

Similarly, in its search for the most obscure authority, the Commonwealth quotes from an Office of the U.S. Inspector General audit of *the Social Security Administration* in *1996* that invoked a January *1979* Office of Management and Budget ("OMB") guideline applicable not exclusively to telephone opinion surveys, but to statistical surveys conducted by government agencies. The quoted guideline dating from the Carter Administration required that data collections based on statistical methods have a response rate of at least 75 percent and that data collection activities with response rates under 50 percent should be terminated. Such standards, whether or not justified in 1979, find no current support in professional theory or practice. Indeed, a web search for select key phrases from the quote the Commonwealth brandishes finds no post-1996 employment of this standard even by the OMB or any Inspector General. Tellingly, the only other reference to it found was in a 2002 article explicitly dismissing the approach as hopelessly incorrect and obsolete, observing that "[n]owadays, we, and the U.S. government, content ourselves with response rates that are well below 50 percent." See Julius

Litman, "Humbug, Science, Survey Research," Quirk's Marketing Research Review (November 2002). (Available online at http://www.quirks.com/articles/a2002/20021104.aspx?searchID=1110587572&sort=9).

The Commonwealth's reliance on outdated and discredited authority for its attack on the Defendant's poll illustrate how misguided their attack is. In the absence of any well founded opposition or countervailing evidence, the Defendant's argument that the community from which the jury will be selected hopelessly tainted by adverse publicity is fully supported by the results of two professionally constructed and professionally administered opinion polls.

**F. Much of the Commonwealth's Opposition is Comprised of Arguments Lifted Verbatim and Without Attribution from the United States Attorney's Opposition to the Motion to Change Venue Filed by Dzhokhar Tsarnaev**

As one reads the Commonwealth's Opposition, it becomes apparent that sentences, paragraphs and indeed entire pages have been reproduced without attribution from the Opposition filed by the United States to contest a motion for a change of venue that was recently filed in federal court by accused Boston Marathon Bomber Dzhokhar Tsarnaev. Appendix No. 1 to this Reply Memorandum illustrates the magnitude of this practice. The Appendix contains a comparison of passages from the Commonwealth's Opposition that align word-for-word or, after giving effect to some editing by the Commonwealth, nearly word-for-word with the U.S. Attorney's Opposition in *Tsarnaev*.

Leaving aside all of the reactions one might have on many levels to this extensive, undisclosed submission of another's work to a court, the conduct appears to convey a lack of interest on the part of the Commonwealth in fashioning its own vigorous opposition to Hernandez's motion for a change of venue. By simply cutting and pasting the work of others, the Commonwealth conveys the message that a recycled opposition is sufficient to blunt Hernandez's motion for a change of venue. In so doing, the Commonwealth greatly

misapprehends the well-founded basis for Hernandez's motion and the unique circumstances of *this* case.

## Conclusion

For all the foregoing reasons and the reasons stated in the Defendant's Memorandum of Law and supporting affidavits, Hernandez's Motion for Change of Venue should be granted.

Respectfully Submitted,

Aaron Hernandez, by his counsel

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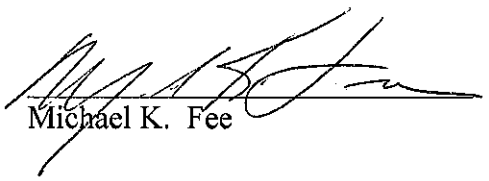
## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document upon the Commonwealth by e-mailing and mailing a copy thereof, US mail, postage prepaid, to: Patrick Bomberg, Assistant District Attorney, Bristol County, 888 Purchase Street, New Bedford, MA 02740 on October 27, 2014.



Michael K. Fee

# APPENDIX 1

**Commonwealth's Opposition: Hernandez**

For its part, the U.S. Supreme Court has presumed jury prejudice on the basis of pretrial publicity in a grand total of only *three* cases, all of which were decided nearly fifty years ago. See Rideau v. Louisiana, supra; Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966).

Commonwealth at 3. (N.B. Rideau not cited previously)

**United States' Opposition: Tsarnaev**

The Supreme Court has presumed jury prejudice on the basis of negative community sentiment and pretrial publicity in only three cases, all of which were decided nearly 50 years ago: Rideau v. Louisiana, 373 U.S. 723 (1963), Estes v. Texas, 381 U.S. 532 (1965), and Sheppard v. Maxwell, 384 U.S. 333 (1966).

Unites States' at 4.

**Commonwealth's Opposition: Hernandez**

Pretrial publicity, standing alone, even where it is "pervasive [and] adverse," is never sufficient to support a finding of presumptive prejudice. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976).

Commonwealth at 3.

**United States' Opposition: Tsarnaev**

Moreover, the Supreme Court has repeatedly held that ''pretrial publicity -- even pervasive, adverse publicity-- does not inevitably lead to an unfair trial." Nebraska Press Assn. v. Stuart, 427 U.S. 539, 554 (1976); accord Gannett Co., Inc. v. DePasguale, 443 U.S. 368 404 n.1 (1970)

United States' at 8.

**Commonwealth's Opposition: Hernandez**

As for the content of the news coverage, while the scrutiny has been intense, none of the stories has "contained [a] confession or other blatantly prejudicial information." Skilling, 561 U.S. at 381. That alone has been deemed sufficient to defeat a claim of presumed prejudice in prior cases. See, e.g., United States v. Haldeman, 559 F.2d 31, 61-62

Commonwealth at 7.

**United States' Opposition: Tsarnaev**

While news stories about Tsarnaev have not all been kind, they have "contained no confession or other blatantly prejudicial information" as in Rideau. Skilling, 561 U.S. at 381. That alone is enough to defeat a claim of presumed prejudice. See, e.g. United States v. Haldeman, 559 F.2d 31, 61-62 (D.C. Cir. 1976) (holding that Watergate defendants were not entitled to change of venue because "the pretrial

United States' at 7.

**Commonwealth's Opposition: Hernandez**

Nothing cited by the defendant here even approaches the level of prejudice present in Rideau. In fact, while there is no doubt that there has been some measure of sensationalized coverage of the defendant's case here, the vast majority of the stories have been largely "factual, as opposed to inflammatory." United States v. Misla-Aldarondo, 478 F.3d 52, 58 (1st Cir. 2007).

Commonwealth at 8.

**United States' Opposition: Tsarnaev**

Press coverage of the Boston Marathon bombings has undoubtedly been extensive, but "[e]xtensive knowledge in the community of either the crimes or the defendants is not sufficient, by itself, to render a trial constitutionally unfair." Drougas, 748 F.2d at 29. That is especially true where, as here, the coverage has been largely "factual, as opposed to inflammatory." United States v. Misla-Aldarondo, 478 F.3d 52, 58 (1 51 Cir. 2007).

United States' at 7.

However, as a matter of discretion, the Court is free to ignore these poll results altogether. See, e.g., United States v. Rodriguez, 581 F.3d 775, 785-86 (8th Cir. 2009) ("court has expressed doubts about the relevance of such polls when reviewing rejected change-of-venue motions"); United States v. Campa, 459 F.3d 1121, 1145 (2006) ("entirely within the district court's prerogative to reject outright .. . [statistical] survey as a basis upon which to grant a motion to change venue"); Haldeman, *supra* at 64 n.43 ("in determining whether a fair and impartial jury could be empanelled the trial court did not err in relying less heavily on a poll taken in private by private pollsters and paid for by one side than on a recorded, comprehensive voir dire examination conducted by the judge in the presence of all parties and their counsel pursuant to [long established] procedures, practices and principles"); United States v. McVeigh, 918 F. Supp. 1467, 1473 (1996) ("data from opinion surveys done by qualified experts who have given their opinions about the results and their meaning . . . . are but crude measures of opinion at the time of the interviews"). There is especially good reason to exercise that discretion here; the defendant's polling procedures and reports fail to conform to the even the most basic and widely-accepted professional requirements.

The American Society of Trial Consultants' Professional Code for Venue Surveys is clear:

> The trial consultant's presentation of survey results to a court shall include the questionnaire that was used in the survey, identification of the primary persons who performed the work (including their qualifications), and descriptions of how each of the following standard steps for conducting a survey was completed: (1) design of the survey instrument; (2) determination of eligibility and sampling measures; (3) training of interviewers and supervisors to conduct the interviewing; (4) interviewing procedures; (5) dates of data collection; (6) calculation of sample completion rate; and (7) tabulation of survey data.

Commonwealth at 9 and 10.

**United States' Opposition: Tsarnaev**

Courts facing change of venue motions have discretion to disregard polling data and often do. See, e.g., United States v. Rodriguez, 581 F.3d 775, 785-86 (8th Cir. 2009) ("This court has expressed doubts about the relevance of such polls when reviewing rejected change-of-venue motions."); Campa, 459 F.3d at 1145 ("It was entirely within the district court's prerogative to reject outright Professor Moran's survey as a basis upon which to grant a motion to change venue."); Haldeman, 559 F.2d at 64 n.43 ("It is our judgment that in determining whether a fair and impartial jury could be empanelled the trial court did not err in relying less heavily on a poll taken in private by private pollsters and paid for by one side than on a recorded, comprehensive voir dire examination conducted by the judge in the presence of all parties and their counsel pursuant to procedures, practices and principles developed by the common law since the reign of Henry II."). Even the district court in McVeigh dismissed the importance of polling data in that case, writing that "data from opinion surveys done by qualified experts who have given their opinions about the results and their meaning . . . . are but crude measures of opinion at the time of the interviews. There is no laboratory experiment that can come close to duplicating the trial of criminal charges." McVeigh, 918 F.Supp. at 1473.

Tsarnaev's submission is of especially little use because it fails to meet even the minimal professional standards for the presentation of polling data on a change of venue motion. The American Society of Trial Consultants' Professional Code for Venue Surveys states:

> The trial consultant's presentation of survey results to a court shall include the questionnaire that was used in the survey, identification of the primary persons who performed the work (including their qualifications), and descriptions of how each of the following standard steps for conducting a survey was completed:
>
> • Design of the survey instrument
> • Determination of eligibility and sampling measures
> • Training of interviewers and supervisors to conduct the interviewing
> • Interviewing procedures

- Dates of data collection
- Calculation of sample completion rate
- Tabulation of survey data

United States' at 11 and 12.

**Commonwealth's Opposition: Hernandez**

The defendant's failure to include crucial elements (including full disclosure of items 2, 3, 6 and 7) of this information in his initial submission necessarily robs the results of persuasive force.

Commonwealth at 10.

**United States' Opposition: Tsarnaev**

Tsarnaev's failure to include any of this information in his motion necessarily robs the results of persuasive force.

United States' at 12.

**Commonwealth's Opposition: Hernandez**

Another obvious flaw in the poll is the absence of control data. For example, the defendant's allegation that 70% of respondents believe that the defendant is "definitely or probably" guilty does not represent prejudice against the defendant if the same percentage held a similar view with respect to any defendant arrested and charged with murder.

Commonwealth at 12.

**United States Opposition: Tsarnaev**

Another obvious flaw in the poll is the absence of control data. For example, Tsarnaev's allegation that 37% of Boston respondents favor the death penalty if he is found guilty does not represent prejudice *against Tsarnaev* if the same percentage would favor the death penalty for any defendant found guilty of a capital crime.

United States' at 14.

**Commonwealth's Opposition: Hernandez**

For the purposes of this analysis, it is important to note that courts have repeatedly held that "the due process guarantee of trial by a fair and impartial jury can be met even where .. virtually all of the veniremen admit to some knowledge of the defendant due to pretrial publicity." United States v. Bliss, 735 F.2d 294, 297-98 (8th Cir. 1984). As the Supreme Court explained in Irvin v. Dowd, 366 U.S. 717 (1961):

> 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 . . . 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.

Id. at 722-23. Cf. Reynolds v. United States, 98 U.S. 145, 155-156 (1879) ("every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits"); United States v. Drougas, 748 F.2d 8, 29 (1984) ("this court has previously recognized that the sixth amendment does not require that each juror's conscious mind be *tabula rasa*, let alone his or her subconscious."); Knapp v. Leonardo, 46 F.3d 170, 176 (2nd Cir. 1995) (finding no manifest error in state court's determination that jury was impartial despite defense argument that 83% of veniremen were excused because they had prejudged the case); People v. Ramirez, 139 P.3d 64, 87-91 (Cal. 2006) (upholding lower-court decision to keep capital murder trial in Los Angeles despite poll of prospective jurors showing that 94.3% had heard of the case, 52.7% recalled "something about defendant, such as that he was a Satanist or that he looked evil or mean" 46% "said their concern for their safety had increased when the murders were occurring,"

51.7% thought the defendant was "responsible" for the charged murders, and the defendant's venue expert testified "that the levels of recognition and predisposition were the highest he had ever seen"). Thus, even assuming that some

Commonwealth at 18 and 19.

**United States' Opposition: Tsarnaev**

The courts have repeatedly held that "the due process guarantee of trial by a fair and impartial jury can be met even where ... virtually all of the veniremen admit to some knowledge of the defendant due to pretrial publicity." United States v. Bliss, 735 F.2d 294, 297- 98 (8th Cir. 1984). As the Supreme Court explained in Irwin v. Dowd, 366 U.S. 717 (1961):

> 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 as to 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.

Id. at 722- 23. Accord Reynolds v. United States, 98 U.S. 145, 155- 156 (1879) ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."); Drougas, 748 F.2d at 29 ("[T]his court has previously recognized that the sixth amendment does not require that each juror's conscious mind be tabula rasa, let alone his or her subconsciousness."); Knapp v. Leonardo, 46 F.3d 170, 176 (2nd Cir. 1995) (finding no manifest

error in state court's determination that jury was impartial despite defense argument that 83% of veniremen were excused because they had prejudged the case); People v. Ramirez, 139 P.3d 64, 87-91 (Cal. 2006) (upholding lower-court decision to keep "Night Stalker" capital murder trial in United States' at 13.

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**SUPPLEMENTAL DECLARATION OF JOHN DELLA VOLPE**

I, JOHN DELLA VOLPE, being duly sworn, declare as follows:

1. I am the Chief Executive Officer and Founder of SocialSphere, Inc. ("SocialSphere"), in Cambridge, Massachusetts. I submit this Supplemental Declaration ("Second Declaration") to augment information conveyed through the Declaration of John Della Volpe ("First Declaration") that was submitted in support of Defendant Aaron Hernandez's Motion for a Change of Venue.

2. Telephone surveys are a common and accepted method of sampling public opinion. One of the fundamental building blocks of a telephone survey is the bank of telephone numbers to be called. Certain firms are in the business of compiling banks of telephone numbers that can be purchased by organizations like SocialSphere that sample public opinion through telephone surveys. The banks of numbers are typically compiled in two ways discussed in more detail below: lists of telephone numbers assembled by a vendor ("Listed Samples") or through the random generation of telephone numbers for pre-identified area codes and exchanges ("Random Digit Dialing" or "RDD")

3. Listed Sample Method: Vendors assemble banks of telephone numbers from the telephone numbers found in various telephone directories and other public sources to which individuals voluntarily contribute or "list" their telephone numbers, including cell phone numbers. Telephonic polling that is conducted using banks of phone numbers from listed sources are referred to as using "Listed Samples." This is common practice and routinely used in numerous research environments including during election season when registered voting lists appended with listed samples are used to target groups of likely voters. A sample of listed telephone numbers drawn for the targeted area – in this case towns and cities in Bristol County – can be -- and was in this case -- representative and statistically valid.

4. Random Digit Dialing Method: Not all persons list their phone numbers in directories or disclose their telephone numbers in other settings that can be accessed by the firms that accumulate banks of telephone numbers and offer them for use in telephone surveys. To overcome the challenge presented by unlisted telephone numbers, the technique called "Random Digit Dialing" or "RDD" was developed. Under Random Digit Dialing, the last four digits of a telephone number are randomly generated and paired with known area codes and exchanges in the area targeted for polling. Because the numbers to be called are randomly generated and not at all dependent on listed numbers, in theory, an RDD sample could include numbers that would never appear in a bank of listed numbers as well as numbers that are unassigned to any user.

5. For example, Bristol County is covered by Area Code 508. The City of Fall River lies within Bristol County and uses the telephone exchange 678. In theory, each telephone exchange, can be matched with 10,000 possible four-digit numbers, but not all of them are in use and many may belong to users such as businesses or institutions. A random digit dialing sample is selected by randomly selecting area code-exchange combinations (e.g., 508 + 678) and then appending a random four-digit random number.

6. Both Listed Samples and RDD Samples can be constructed to provide a representative survey of targeted populations and support valid research. Both systems are commonly used in market and public opinion research. Neither Listed Sample-based surveys nor RDD-based surveys suffer from the inherent "opt-in" bias that often exists in a variety of Internet-based methods because the selection of a number to be called under either approach is truly random and does not consist of any telephone numbers that are from individuals who are actively seeking to be called and participate in surveys for a financial reward.

7. As described in the Defendant's Supplement to its Motion for a Change of Venue and the First Declaration, when SocialSphere arranged for a telephone survey of residents of Bristol County in August, I ordered the call center to use a bank of telephone numbers for Bristol County – obtained from a vendor well known to SocialSphere – that were assembled using the Random Digit Dialing method. Unbeknownst to me and contrary to my orders and understanding, the vendor supplied the call center with a bank of telephone numbers assembled using the Listed Sample methodology.

8. I learned of the call center's use of a Listed Sample bank of telephone numbers only after the results of the survey that was designed by SocialSphere and conducted in August had been employed by the Hernandez Defense Team in support of its Motion for a Change of Venue.

9. Both the Listed Sample and Random Digit Dialing methodologies are both widely accepted methods of compiling telephone numbers for use in telephone opinion surveys. Nevertheless, because I intended for the call center conducting our survey to use telephone numbers generated through the Random Digit Dialing method, I instructed the call center to conduct the survey again using telephone numbers generated through the Random Digit Dialing method, as I had originally intended.

## The Second Survey

10. Professionals at SocialSphere, acting under my supervision, assessed the population and demographics of Bristol County and determined that a scientific survey of N=400 adults age 18 and over would yield results that were not only statistically valid, but also result in a margin of error of +/- 4.9% at the 95% confidence level.

11. The Second Survey employed the same questionnaire that was used in the first telephone survey.

12. Using the polling instrument designed by SocialSphere, reliable call center personnel conducted a telephone poll of N=400 adults age 18 and over from October 7 through October 12, 2014. The calls were placed by live interviewers using a probability based landline and cell Random Digital Dialing sample.

13. In my professional opinion, the poll was conducted of a representative sample of the adult population in Bristol County. For example, 52% of the respondents in the poll were female and 48% were male. U.S. Census Bureau Data amassed in 2013 found Bristol County to be 51.5% female and 48.5% male. 83% of the poll participants identified themselves as White (Census found 85% to 90.8% White), 5% identified as black or African American (Census found Bristol County to be 4.4% black or African American), 1% American Indian (Census found 0.6%) and 7% Hispanic, Latino or Spanish origin (Census found 6.6% in 2013). The correlation of other demographic and geographic features of the poll respondents establish in my professional opinion that the poll sampled the opinions of a representative cross-section of the adult population of Bristol County.

## Survey Results

14. **More than three-in-five (61%)** of Bristol County residents are following Mr. Hernandez's case closely, with a cohort of **24%** responding that they are following the case **"very closely"** and **37%** responding that that they are following the case **"somewhat closely."**

15. **A higher proportion (71%)** of residents believe that they currently know something about the case, with **27%** stating that they knew **"a lot"** about the case and **44%** stating they know **"a little."** One-in-10 residents of Bristol County (10%) said they knew "nothing at all" about the case, while only 18% said they do not "know much."

16. **Nearly 2-in-3 adults in Bristol County believe Aaron Hernandez is definitely, or probably guilty. 18%** of residents polled agreed with the statement, "I'm certain Aaron Hernandez is guilty of first degree murder and nothing could persuade me otherwise." **45%** of those polled agreed with the statement, "I'm not 100% sure, but I think Aaron Hernandez is probably guilty."

17. Only 7% responded that Mr. Hernandez is "probably not guilty." An additional 25% said they did not know.

18. Media outlets have been effective in raising awareness about the case. Indeed, awareness of the case involving Mr. Hernandez among residents of Bristol County is very high. **89%** of Bristol County residents have heard of the case from television news, **48%** from radio news, **50%** from print or online editions of local or Boston newspapers, **41%** from print or online editions of national newspapers, **32%** from social media such as Facebook, Twitter, or various blogs and **41%** have heard about the case from talk radio stations.

Signed under the pains and penalties this 24th day of October 2014.

John Della Volpe