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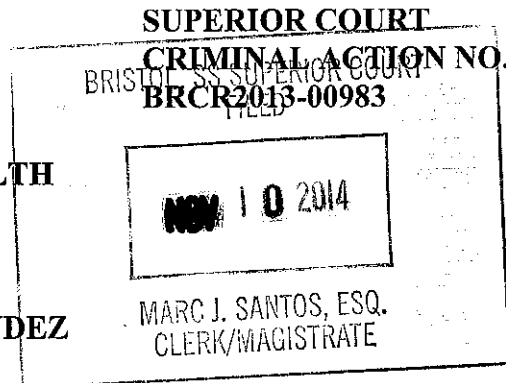
COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

COMMONWEALTH

vs.

AARON HERNANDEZ



**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT
AARON HERNANDEZ'S MOTION FOR A CHANGE OF VENUE**

Defendant Aaron Hernandez moves, pursuant to Mass. R. Crim. P. 37(b)(1), the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights, to change the location of his trial to a county “outside the boundaries of the Boston media market, such as Hampden or Worcester County.” He contends that he is unable to obtain a fair trial in Bristol County due to the extensive prejudicial pretrial publicity surrounding his case. For the reasons discussed below, the motion is **denied** without prejudice.¹

DISCUSSION

Due process requires that provisions prescribing the venue of a criminal trial not impede its transfer to a different county, at the defendant’s request, “if extraordinary local prejudice will prevent a fair trial” Skilling v. United States, 561 U.S. 358, 378 (2010). See also Commonwealth v. Toolan, 460 Mass. 452, 462 (2011) (art. 12 of Massachusetts Declaration of Rights and Sixth Amendment to U.S. Constitution guarantee right to be tried by impartial jury).

Massachusetts Rule of Criminal Procedure Rule 37(b)(1) provides that a trial judge may order a change of venue “if the court is satisfied that there exists in the community where the

¹At the conclusion of the hearing on the defendant’s motion for a change of venue, the Court orally denied the motion and indicated that a written decision would follow.

prosecution is pending so great a prejudice against the defendant that he may not there obtain a fair and impartial trial.” Mass. R. Crim. P. 37(b)(1). A judge has substantial discretion in deciding whether to transfer a case to another county based on pretrial publicity. Commonwealth v. Hoose, 467 Mass. 395, 405 (2014).

To be entitled to a change of venue on the basis of presumptive prejudice,² the defendant has the burden of demonstrating, by a “solid foundation of fact,” that prejudgment of the case is so substantial that, regardless of the voir dire procedures to be used, the defendant is unable to obtain a fair and impartial jury in Bristol County. Hoose, 467 Mass. at 405-406; Toolan, 460 Mass. at 466. See also Commonwealth v. McCowen, 458 Mass. 461, 476 (2010) (noting that change of venue should be ordered with great caution). Prejudice is presumed only in the most extreme case in truly extraordinary circumstances where the trial atmosphere is “utterly corrupted” by media coverage. Skilling, 561 U.S. at 381; Hoose, 467 Mass. at 406; Commonwealth v. Entwistle, 463 Mass. 205, 221 (2012), cert. den., 133 S.Ct. 945 (2013); Toolan, 460 Mass. at 463.³

²At this stage, no actual prejudice has been shown.

³Cases in which the United States Supreme Court has overturned convictions because of pretrial publicity are distinguishable. E.g., Sheppard v. Maxwell, 384 U.S. 333, 353-355 (1966) (due process violated by months of virulent pretrial publicity about defendant accused of bludgeoning pregnant wife to death, coupled with the fact that three months before trial defendant examined for hours without counsel during an televised inquest, and bedlam and carnival atmosphere reigned at trial in which media practically took over courtroom, disrupted proceedings, and turned jurors into celebrities); Estes v. Texas, 381 U.S. 532, 536-538 (1965) (due process violated by extensive pretrial publicity, considerable disruption of pretrial proceedings by reporters and television crew, and televising of trial denying the defendant the “judicial serenity and calm” to which he was entitled); Rideau v. Louisiana, 373 U.S. 723, 725-726 (1963) (due process violated where in parish of 150,000 people, defendant’s twenty-minute videotaped detailed confession was broadcast on three separate occasions to audience of between 24,000 and 53,000 individuals two months before trial). “In each of these cases, [the Supreme Court] overturned a ‘conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage’” Skilling, 561 U.S. at 380. Indeed, in Skilling, the Court stressed that the

The size and characteristics of the community in which the crime occurred is relevant to whether the defendant has demonstrated a presumption of prejudice that requires a venue transfer. Skilling, 561 U.S. at 382; Toolan, 460 Mass. at 463. Based on the 2010 Census, the United States Census Bureau projected that in 2013, the population of Bristol County would have grown to 552,780 without regard to eligibility for jury service.⁴ The county is diverse; it includes four cities as well as suburban and rural communities. This provides a large enough pool of potential jurors from which to select an impartial jury. See Commonwealth v. Leahy, 445 Mass. 481, 493-494 (2005) (noting that Plymouth County has population and urbanity that greatly decrease risk that impartial jury could not be seated).⁵ Cf. Toolan, 460 Mass. at 464 (small size of Nantucket County, with only 10,000 permanent residents and tight network of social relations, weighed in favor of finding local prejudice). There are no known significant links among the victim's or defendant's family and the over-all jury venire. Apart from the location of the killing in North Attleboro and the decedent's acquaintance with the defendant and his fiancée, the decedent had no apparent connection to Bristol County; his family and friends live in the Boston area, and the defendant's sole connection is his relatively brief residence in Bristol County. Three of the four cities in Bristol County, all of which

“months [of] virulent publicity about Sheppard and the murder” did not alone deny due process. Id. The circumstances of these cases are not present here. The pre-trial proceedings in this case have not been marked by a carnival atmosphere. Indeed, in several recent hearings, the general public was sparsely, if at all, present. The media has not been a disruptive presence. The defendant has made no confession.

⁴According to the affidavit of John Della Volpe submitted by the defendant, the U.S. Census Bureau also estimates that 21.4% of the population in 2013 was under 18 years of age.

⁵According to the U.S. Census Bureau estimates, in 2013, Plymouth County had a population of 501,915, with 22.9% of the population under 18 years of age. quickfacts.census.gov/qfd/states/25/25023.html.

are larger than Attleboro, have no connection to the crime scene or to the parties involved in this case. There was nothing unusually shocking or repellant about the facts of this particular crime that would set community opinion in Bristol County against Hernandez. See Commonwealth v. Blackburn, 354 Mass. 200, 204 (1968) (“[i]ntelligent persons read and take an interest in events; because of the same endowments they are likely to give due regard to the evidence and to disregard rumor, report, and suspicion when in the solemnity of a court room a defendant is tried and his reputation and his liberty or his life are at stake”).

The content and character of the news stories about the defendant, including whether they contain a confession or other blatantly prejudicial information which readers or viewers could not reasonably be expected to put out of their minds, obviously are also relevant. Skilling, 561 U.S. at 382-383; Toolan, 460 Mass. at 463. Pervasive, adverse pretrial publicity does not inevitably require a change of venue. Skilling, 561 U.S. at 384; Toolan, 460 Mass. at 463. “Prominence does not necessarily produce prejudice, and juror *impartiality*, [the Supreme Court has] reiterated, does not require *ignorance*.” Skilling, 561 U.S. at 381 (emphasis in original). Coverage that is more factual than inflammatory or sensational undermines a claim of presumptive prejudice. United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir.), cert. den., 498 U.S. 845 (1990); Hoose, 467 Mass. at 407; Commonwealth v. Morales, 440 Mass. 536, 540-541 (2003).

Unquestionably, there has been extensive publicity about this case and about Hernandez. Most of the coverage contains factual reports about this case and other court proceedings involving Hernandez, his co-defendants, fiancée and cousin. None of the media reports claim that Hernandez has made a confession. This type of coverage is not so inflammatory or sensational as to give rise to a presumption of prejudice. Hoose, 467 Mass. at 407 (fact-based publicity, even if it references

charges pending against the defendant, a confession, or a prior criminal record, not the sort of sensational publicity that gives rise to a presumption of prejudice).

Some sensational stories, vituperative opinions, speculation, and allegations of prior bad acts have also been circulated. The defendant points, in particular, to an article in Rolling Stone Magazine in August of 2013, a CNN documentary that aired in June and September of 2014, a magazine article in Gentlemen's Quarterly dated September of 2014 entitled "The 25 Biggest Sleazebags in Sports," and a May 2014 article from Metro, a New York newspaper, reporting on the results of a poll of the most hated persons in America. Their circulation does not mean that there is an actual predisposition against the defendant because "familiarity with [the defendant] or his past" must be distinguished from "an actual predisposition against him . . ." Murphy v. Florida, 421 U.S. 794, 800, n.4 (1975) (declining to find prejudice where defendant was notorious thief whose prior crimes, including theft of Star of India sapphire from New York museum and a murder conviction, had received extensive press, including national newspaper coverage, but voir dire indicated no hostility to defendant by jurors who served in his trial suggesting a partiality that could not be laid aside); United States v. Angiulo, 897 F.2d at 1181 (frequent references in extensive media coverage to "reputed crime figure Gennaro Angiulo," "mafia boss Angiulo" and "reputed leader of Boston underworld" fall far short of type of emotionally charged, inflammatory, sensationalistic coverage needed to support presumption of prejudice). There also is no credible evidence as to the likely number of potential jurors who were actually exposed to such media coverage.

The defendant relies upon two telephone polls he commissioned in support of his contention that the pre-trial publicity about him and his case has so predisposed the citizens of Bristol County against the defendant that venue must be transferred. The polls fall far short of being a "solid

foundation of fact” to support a change of venue.

Hernandez hired SocialSphere, Inc. to design and construct a public opinion poll of Bristol County residents. Neither SocialSphere nor its principal, John Della Volpe, is a professional trial consultant. Upon SocialSphere’s engagement, counsel for Hernandez furnished Della Volpe with a copy of the American Society of Trial Consultants (“ASTC”) Professional Code for Venue Surveys. In an affidavit submitted in support of the defendant’s motion to change venue, Della Volpe attested that he is “confident that the poll constructed and executed by SocialSphere comports with these standards.” In numerous ways it does not, as Della Volpe conceded in his testimony at the hearing on the defendant’s motion.⁶

⁶For example, the Professional Standards of the ASTC Professional Code state that, without disclosing that the survey is being conducted in connection with a motion to change venue, the survey introduction should include, among other matters, “neutral explanations to potential respondents that describe: the purpose of the survey, the caller’s identity and employer (or the auspices under which the survey is being conducted), [and] how the phone number or household was selected” Practice Guidelines of the ASTC Professional Code state that “[t]rial consultants should accurately describe the purpose of the survey so that respondents can make an informed decision about their participation.” Typically, according to the Practice Guidelines, respondents are told that the callers are conducting a “public opinion survey among residents of _____ County to obtain opinions about the criminal justice system and about a specific case” or, if no criminal justice questions are included, the introduction might explain that “We are conducting interviews with _____ County residents about a criminal case that has been in the news.” The poll designed by SocialSphere required its subcontractor to be dishonest about the purpose of the survey; callers said that they were calling on behalf of ADG, a national research firm, which was conducting an opinion poll of Massachusetts residents on issues facing the state. ASTC Professional Standards for venue surveys further provide that “Respondents must be made aware that they can say they do not know or have no opinion,” and that “[o]nce an eligible respondent agrees to participate, the interview should begin with an instruction to the respondent that there are no right or wrong answers to the questions. The introduction should also inform respondents that they are free to answer ‘don’t know’ or ‘no opinion’ at any time.” SocialSphere did not tell its subcontractor to so advise respondents and the callers did not so advise. The ASTC Professional Standards also state that “[t]he validity of responses is enhanced by omitting nonessential items from the interview.” The SocialSphere poll includes numerous nonessential items. The Professional Standards state that potential survey respondents should be screened to establish eligibility for jury service. The respondents questioned by SocialSphere

On August 26 and August 27, 2014, a subcontractor of SocialSphere conducted a telephone poll of Bristol County residents over the age of eighteen.⁷ SocialSphere attempted to contact 9,968 individuals. Only 409 people completed the telephone survey. This represents a response rate of only 4.1%. Cf. United States v. Tsarnaev, 2014 WL 4823882 at *2 (D. Mass. O’Toole, J.) noting that poll response rate of 3% was very low and small sample was not representative of geographic distribution of people in district). The defendant’s conclusions from the poll are premised on the assumption, which is questionable given the lack of inquiry in the poll as to citizenship status, that the 409

were not so screened because they were not asked if they were citizens. Another Practice Guideline states that respondents’ recall of awareness of a case “is usually explored with open-ended questions designed to elicit respondents’ descriptions of what they have heard or read in the media. Respondents’ reactions to what they have read or heard are usually explored with open-ended questions designed to let respondents express their opinions and feelings about the case, the defendant and/or the injured parties in their own words.” Moreover, according to another Practice Guideline, “[c]onsistency between respondents’ answers to open-ended questions about what they recall about the case and their responses to questions about recognition of specific case facts can be an indicator of survey validity.” The SocialSphere poll included no open-ended questions. The Practice Guidelines also state that “[i]n accordance with generally accepted principles for survey research, the order in which predefined responses are offered to respondents should be varied.” More specifically, half of the respondents should be given the response category “definitely not guilty” first while the other half should begin with “definitely guilty.” There is no reason to believe that this was done by SocialSphere’s subcontractor.

⁷Contrary to the representation in Della Volpe’s affidavit, telephone numbers for the August poll were not obtained “using a probability based landline and cell RDD [Random Digit Dialing] sample.” In the RDD method, the last four digits of a telephone number are randomly generated and paired with known area codes and exchanges in the targeted area. The August poll numbers were obtained through the Listed Sample method, in which numbers are obtained from sources to which individuals have voluntarily contributed or listed their phone numbers, including cell phone numbers. Only after the Commonwealth sought information about how the August poll had been conducted did SocialSphere discover that the RDD method had not been used. It instructed its subcontractor to re-conduct the same poll using the RDD method. The results of the second telephone poll, conducted from October 7 through October 12, 2014, are similar to those of the first. The percentage responses referenced in this Memorandum are derived from the first poll, where the Court has been supplied with response data for each question posed.

respondents are all eligible for jury duty.⁸

SocialSphere designed the poll so that its interviewers would request to speak to the youngest person eighteen years or age or older in the household. There is no credible reason to believe that the age distribution of the respondents matches the age distribution in Bristol County.

Of the 409 respondents, 30% have a college degree and 16% have a graduate degree. It is highly unlikely that 46% of the typical Bristol County venire has a Bachelor's degree or higher. According to the United States Census Bureau for the period 2008-2012, only 25.2% of persons aged 25 and greater have a Bachelor's degree or higher in Bristol County and only 39% have such a level of education in the state as a whole.⁹ The lack of representativeness of the respondents' educational level casts significant doubt on the validity of the poll results.

The household income of the respondents may also be unrepresentative. Given the fact that 21% of the respondents refused to disclose this information and that 4% did not know, a comparison to United States Census Bureau data is not possible.

With respect to marital status, 59% of the respondents were married and 17% had never been married. There is no credible showing that these figures are representative of Bristol County.

The geographic distribution of the respondents does not appear to reflect the geographic distribution of adult residents in Bristol County. The answers to the poll reflect that 11% of the respondents live in Attleboro, 19% in Fall River, 14% in New Bedford, and 8% in Taunton. Based

⁸SocialSphere chose to ask respondents if they were voters but not to ask whether they were citizens. According to SocialSphere's own submission, 11.8% of the total population of Bristol County is foreign born, some of whom undoubtedly are non-citizens. There is no way to know how many of the 10% non-voters who completed SocialSphere's poll are also non-citizens.

⁹quickfacts.census.gov/qfd/states/25/25005.html.

on 2010 census data, the United States Census Bureau estimates that in 2012 the population of Attleboro was 43,837, the population of Fall River was 88,945, the population of New Bedford was 94,929, and the population of Taunton was 56,055.¹⁰ Residents of Attleboro, who live closest to the crime scene, therefore are over represented among the poll respondents and residents of New Bedford, who live furthest from the crime scene, are under represented. Apart from Attleboro's closer connection to the crime scene, there are significant demographic differences between Attleboro and New Bedford. For example, according to the United States Census Bureau, for the years 2008-2012, 30% of Attleboro residents age 25 or greater have a bachelor's degree or higher; home ownership rate is 67%, and median household income is \$65,767.¹¹ For the same period, 14.8% of New Bedford residents age 25 or greater have a bachelor's degree or higher; home ownership rate is 43.4%, and median household income is \$36,789.¹²

The Court does not credit Della Volpe's opinion, expressed in his affidavit, that in his "professional opinion, the poll was conducted of a representative sample of the adult population of Bristol County." In support of that statement, he cites only census statistics for sex, race, and ethnicity and then opines that "[t]he correlation of other demographic 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."¹³

¹⁰factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

¹¹quickfacts.census.gov/qfd/states/25/2502690.html.

¹²quickfacts.census.gov/qfd/states/25/2545000.html.

¹³Notwithstanding the opinions contained in Della Volpe's affidavit, some of which were referenced in the Defendant's Memorandum of Law in Support of Defendant's Motion for Change of Venue (e.g. at p. 11), in opposing the Commonwealth's Motion for Discovery

The poll does not ascertain the percentage of respondents who learned anything about this case from the Boston media market. Respondents are asked, for example, if the source of their information is “print or online editions of local or Boston-based newspapers” (emphasis added), making it impossible to know how many of the respondents ever received any information from print or on-line editions of the Boston Globe, the Boston Herald, or any other Boston-based newspapers. There simply is no basis to draw any conclusion as to how many of the 55% of respondents who responded “yes” to this question derived their information from local Bristol County newspapers as opposed to Boston-based newspapers.¹⁴ The questions as to whether information was derived from tv news, talk radio stations, or radio news do not ask respondents to differentiate between whether these sources were local, national, from the Boston media market, or from the nearby Rhode Island media market.¹⁵ The poll does not inquire if the respondents had learned anything about the case either from print or online editions of Rolling Stone Magazine and Gentlemen’s Quarterly or from print or online editions of any national magazines.

Several of the questions, and therefore the resultant answers, are ambiguous. The extent to which the 45% of respondents who indicated that they have followed the case “somewhat closely” have actually followed the case is unknowable from the poll.¹⁶ What the respondents who report

Regarding the Defendant’s Motion for a Change of Venue, the defendant contended that Della Volpe “simply performed tasks and tabulated results at the request of the defense team” and that he is not participating in the case as an “expert” and “has rendered no opinion.”

¹⁴Four daily newspapers are published in Bristol County, namely the New Bedford Standard-Times, the Fall River Herald News, the Taunton Daily Gazette and the Attleboro Sun Chronicle.

¹⁵On the west, Bristol County borders Rhode Island.

¹⁶22% of the respondents reported following the case “very closely.”

knowing a “lot,” “a little” or “not much” about the case actually have read or heard is unknowable from the poll. “A defendant is not entitled to a jury that knows nothing about the crime, so long as jurors are able fairly to weigh the evidence in the case, set aside any information they learned outside the courtroom, follow the judge’s instructions, and render an impartial verdict.” Commonwealth v. Entwistle, 463 Mass. at 221-222.

The level of certainty for the 59% of the respondents who told the callers that they believe that Hernandez is “probably guilty” but who are not 100% certain is also unknowable from the poll. Moreover, there is no reason to believe that the response to this question is at all unique to this case. Exploring a potential juror’s state of knowledge and ability to put aside what he has read and heard in order to ascertain whether the juror can be fair and impartial is best achieved through voir dire. The poll results do not establish that individual voir dire designed to root out prejudice will be inadequate to impanel an impartial jury in Bristol County. The Court intends to bring in approximately 1,125 people for jury impanelment and to use a questionnaire, followed by individual voir dire. Skilling v. United States, 561 U.S. at 388-389 (describing use of comprehensive questionnaire to identify jurors excusable for cause and serve as springboard for further questions to remaining members of array). This should be sufficient to enable the impanelment of sixteen impartial jurors. Id. at 386 (judge can evaluate prospective juror’s inflection, sincerity, demeanor, candor, body language, and apprehension of duty); Commonwealth v. Toolan, 460 Mass. at 468 (individual voir dire enables judge to distinguish between mere exposure to pretrial publicity and bias).

The Court is not persuaded that the public opinion data presented by the defendant shows that the atmosphere in Bristol County has been so utterly corrupted by prejudicial media coverage that

a change of venue is necessary to enable the defendant to obtain a fair trial. Cf. United States v. Rodriguez, 581 F.3d 775, 786 (8th Cir. 2009) (pointing out that trial court not required to consider public opinion polls when ruling on change of venue motions); Shapiro v. Kauffman, 855 F.2d 620, 621 (8th Cir. 1988) (noting that public opinion polls introduced to demonstrate jury bias have found little favor with courts); United States v. Haldeman, 559 F.2d 31, 64 n.43 (D.C. Cir. 1976), cert. den., 431 U.S. 933 (1977) (in ruling on motion to change venue, court did not err in giving little weight to poll commissioned by defendant and conducted by public opinion research company); People v. Ramirez, 139 P.3d 64, 88-90 (Cal. 2006), cert. den., 550 U.S. 970 (2007) (proper to deny change of venue despite telephone survey of 300 randomly selected eligible prospective jurors which indicated that, in case where media coverage saturated the area, 52.7% of those polled recalled something about defendant, such that he was a Satanist or looked evil and mean, and 51.7% believed he was guilty of Night Stalker murders); People v. Mack, 437 N.E.2d 396, 405 (Ill. App. Ct. 1982) (survey indicating that 78.3% of people interviewed believed defendants were definitely or probably guilty did not require change of venue).

The length of time between the peak media coverage of the crime and the trial and whether “the decibel level of media attention diminished somewhat” in the intervening period is also relevant. Skilling, 561 U.S. at 383. See also Toolan, 460 Mass. at 463. Media interest in this case remains very high, but many of the most recent articles have been brief, recounting the court’s rulings on the defendant’s motions to suppress evidence and his fiancée’s motion to dismiss the perjury indictment against her. The Court has also observed that fewer members of the media and the general public are present at pre-trial proceedings than was true earlier in the case. Jury selection is scheduled to take place in January of 2015, approximately eighteen months after Hernandez was indicted.


Hernandez has not demonstrated by a solid foundation of fact that there exists in Bristol County so great a prejudice against him that he cannot obtain a fair and impartial trial there. The defendant has also not persuaded the Court to exercise its discretion under Rule 37(b)(1) to order a change of venue. The Court is confident that a careful and discerning individual voir dire will be an effective means of ensuring an impartial jury. Nothing about the polling proffered by the defendant provides any reason to believe that impaneling a jury in Worcester or Hampden County would be any more or less difficult. The reality is that the extensive media coverage of this case is not driven by local media or by any particular local interest. Because the defendant is an athlete from a nationally prominent professional football team, the case is of interest to people across the state, New England, and the country. Articles in the Boston and national newspapers tendered to the Court are available in these counties as are the on-line editions of those papers, the national magazines and the social media and numerous internet sites on which the defendant focuses. There is no reason to believe that the television coverage in those counties of the case is materially different. There has been no showing that the same poll conducted in Worcester or Hampden County would produce statistically significant different results, that the nature or amount of pre-trial publicity in Bristol County has been greater than in Worcester or Hampden County, that a different percentage of residents of Worcester or Hampden County are fans of the New England Patriots, or that residents of these counties are less focused upon this case or would be less biased against Hernandez than residents of Bristol County. Thus, there is no compelling reason to transfer the case. See Haldeman, 559 F.2d at 64 n.43 (noting that record containing articles from nationally circulated magazines and national network news programs suggested that change of venue would have been of only doubtful value because crime not of peculiar interest to the residents of the district where trial scheduled);

Tsarnaev, 2014 WL 4823882 at *2 (noting national coverage of case and opining that it is doubtful a jury could be selected anywhere in the country whose members were wholly unaware of the Boston Marathon bombings). Cf. Commonwealth v. Moore, SUCR2011-10023 slip op. at *3-5 (Mass. Super. Ct. Oct. 5, 2012) (Locke, J.) (court, in its discretion, brought in jurors from Worcester County in case of intense Suffolk County interest dubbed by Boston media as the “Mattapan Massacre” case, where Boston-based media had extensively covered previous trial, police had concerns about maintaining order in the Mattapan area following verdicts, justice would not be served in the minds of many in the local community until the defendant was held accountable, and there was reason to believe that potential jurors in Worcester would be less focused on a Boston-based murder case).

The Court will reconsider its ruling if, during jury selection, it becomes apparent that it will not be possible to pick a fair and impartial jury in Bristol County.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendant Aaron Hernandez’s Motion for a Change of Venue be **DENIED** without prejudice.



E. Susan Garsh
Justice of the Superior Court

DATED: November/0 , 2014