149

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss. BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE

Introduction. The defendant, Aaron Hernandez, was arraigned in Attleboro District Court on June 26, 2013 on charges of first-degree murder and various firearms offenses. He was subsequently indicted by a Bristol County grand jury for the same crimes and is currently awaiting trial. On September 30, 2014, the defendant moved, pursuant to Mass. R. Crim. P. 37(b)(1), the Sixth Amendment to the United States Constitution, and art. 12 of the Massachusetts Declaration of Rights to transfer his trial to an unspecified "county outside the likely reach of the Boston media market." He asserts that pretrial publicity and public sentiment in Bristol County require the Court to presume that the pool of prospective jurors in the county is so prejudiced against him that impaneling an impartial trial jury there would be impossible. The defendant's

assertions in this regard are not only unsupported by the evidence he offers, but are also demonstrably false.

The simple reality is that neither the victim nor the defendant had - or have - any meaningful connection to Bristol County other than the mere fortuities of where the murder occurred and the defendant's short-term residency there. The nature and quantum of pre-trial publicity in Bristol County is no different than in any other county in the Commonwealth. Moreover, there are straightforward and well-established procedures for ensuring that an impartial jury is seated, regardless of the nature and extent of the press coverage. In particular the Court's previously announced plan to summons one-thousand jurors and meticulously question them will undoubtedly provide more than a sufficient, indifferent, pool of jurors, even if the defendant's contentions were to be credited. The defendant's motion for a change of venue should be denied.

Discussion. In order to obtain a change of venue, a defendant must establish that the venire is "presumptively prejudiced"; that is, he must prove that the trial atmosphere is so utterly corrupted by media coverage that the defendant can obtain a fair and impartial jury only by means of a change in venue. Skilling v. United States, 561 U.S. 358, 378 (2010), quoting Murphy v. Florida, 421 U.S. 794, 798 (1975). Needless to say, such cases are exceedingly rare. As the SJC declared in

Commonwealth v. Toolan, 460 Mass. 452, 463, "presumptive prejudice exists only in truly extraordinary circumstances." In fact, the defendant has failed to cite a single instance in Massachusetts where the failure to allow a change of venue provided the basis for the reversal of a criminal conviction - despite the fact that many widely publicized cases have been tried here. See Toolan, supra at 463 n.17. 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).

The extraordinary rarity of instances in which a change of venue has been deemed necessary is a function of the high standard of proof required to justify the remedy. 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). Indeed, a defendant is not entitled to a jury that knows nothing about the crime. Commonwealth v. Leahy, 445 Mass. 481, 494-495 (2005). Stated differently, "prominence does not necessarily produce prejudice, and juror impartiality does not require ignorance." Skilling, 561 U.S. at 360-61. Before a venire may be deemed "presumptively prejudiced," a defendant

must demonstrate that he is unable to obtain a fair trial from *any jury* selected from that venire, regardless of how carefully the judge performs a voir dire or how many prospective jurors express their belief that they can be fair and impartial. See Rideau v. Louisiana, 373 U.S. 723, 724-726 (1963). Provided "[a] jur[y] can lay aside [its] impression or opinion [derived from press coverage] and render a verdict based on the evidence presented in court," a change of venue is not indicated, irrespective of the character of the media atmosphere. Irvin v. Dowd, 366 U.S. 717, 723 (1961).

Turning to the present situation, it is beyond dispute that media coverage of this case has been extensive. The underlying events and the case itself have received national press attention. It is doubtful whether a jury could be selected anywhere in the country whose members were wholly unaware of the charges against the defendant. Fortunately, as noted already, neither the state nor federal constitution obliges them so to be. In Toolan, supra at 463-464, the SJC observed that:

> [i]n assessing whether such publicity and resulting local prejudice precludes a fair trial, the United States Supreme Court in Skilling looked to [1] the influence, if any, of the media on the trial; [2] the size of the community; [3] the content of the news stories; [4] the length of time between the peak media coverage and the trial; and [5] any evidence from the verdict itself, such as the jury's decision to acquit the defendant of any of the charges. This court has likewise identified the nature of the publicity (whether 'extensive and sensational") as a highly significant factor. . . . However, we have attached primary

> importance to the actual ability of the trial judge to empanel jurors who appear impartial (citations and footnotes omitted).

Here, based on the factors articulated in Toolan and Skilling[1], the defendant has utterly failed to demonstrate that this is the exceptional case where, because of the "extraordinary circumstances" of the pretrial publicity, "the community's prejudgment of the case was substantial enough that empanelling impartial jurors would not be possible." Toolan, supra at 463, 466. See also Commonwealth v. Morales, 440 Mass. 536, 541-542 (2003).

Examining the Skilling/Toolan factors in turn, the defendant has failed to shoulder his heavy burden. In the first instance, the media coverage has had little, if any, impact on the trial proceedings to date.[2] From the outset, the Court effectively imposed a gag order on the parties, first by means of a request for voluntary compliance with the provisions of the Massachusetts Rules of Professional Conduct, and then through an express order. Thus far, the Court has not identified a single violation by either the prosecution or the defense. Moreover, no hearing has ever been delayed or disturbed as a result of any

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[1] The fifth factor has not been considered since it is immaterial to a pretrial assessment of the necessity for a change of venue.

[2] Needless to say, this factor traditionally looks primarily to the actual trial. However, since the trial here has not yet occurred, the extent to which pretrial publicity has impacted the pretrial proceedings provides a useful predictive indicator of how the trial itself might be affected.

pretrial publicity. The media has always maintained proper decorum in the courtroom. In short, press coverage has not impinged on the pretrial process so far in any way. There is no reason to conclude that such will not continue to be the case.

One 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.[3] To the extent that the defendant has asserted that the primary source of problematic new stories is the Boston media market and national media coverage, Bristol County's location in the Providence-New Bedford TMA doubtless accounts for the modest practical impact on the trial proceedings resulting from press coverage of the case to date, and a further basis for concluding that any future impacts likewise will be modest.[4]

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[3]http://transition.fcc.gov/dtv/markets/maps_current/Providence_RI-New_Bedford_MA.pdf (date visited, October 9, 2014).

[4] The other inference to be drawn from the defendant's fundamental error regarding the TMA to which Bristol County has been assigned is that the defendant's submissions generally lack any indicia of professionalism or reliability - a point taken up in detail *infra* with respect to the defendant's polling data. Along these lines, it is also worth noting that one of the sites suggested by the defendant as an alternative venue, Worcester, *is*, in fact, in the Boston TMA. And so, the defendant, having

As for the next factor, size of the community, Bristol County is significantly larger than regions in which pretrial publicity has previously provided a predicate for a change of venue. Bristol County, by the defendant's own admission, is a politically, ethnically and financially diverse region that comprises more than a half-million residents – approximately seventy-five percent of whom are – again according to the defendant – eligible for jury service. By comparison, the defendant in Rideau was tried in a Louisiana Parish less than one-third that size. Skilling, 561 U.S. at 381-82. "Given th[e] large, diverse pool of potential jurors [in Bristol County], the suggestion that [sixteen] impartial individuals could not be empaneled is hard to sustain." Skilling, supra at 381.

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

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identified the Boston TMA as problematic, proposes removing the case from a site *outside* the Boston TMA to a location *inside* the Boston TMA – plainly a counterintuitive result. In point of fact, by the defendant's own logic, Bristol County is an ideal site for the trial.

(D.C. Cir. 1976). Contrast the current situation with the facts of Rideau, supra at 726:

> What the people saw on their television sets was [the defendant], in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder. . . . this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was [the defendant's] trial -- at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

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,[5] 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).

Finally, the length of time between the peak media coverage - a period that indisputably coincided with the defendant's arrest and its direct aftermath - and the trial is significant here: it will be more than a year and a half after the murder of Odin Lloyd by the time trial commences. This is far longer than in cases where grounds for a change of venue have been found to exist. In Rideau, for example, trial occurred a mere two months after the crime was committed. Here, as a result of

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[5] Some of the most sensationalized coverage cited by the defendant comes from national media and relies on friends and family of the defendant as sources. E.g. *Rolling Stone* article submitted by defendant.

the passage of time, public interest not significant to begin with has waned. In fact the Court has had an opportunity to view the minimal public interest in the case as reflected by the non-press, non-family public, non-courthouse personnel presence in the courtroom. Recently during three days of hearings on the defendant's motions that presence was non-existent. In sum, by reference to the Skilling/Toolan factors, there is simply no case for a change of venue here.

In order to bolster his claim of pretrial prejudice, the defendant relies heavily on a telephonic poll conducted by SocialSphere, Inc., a Cambridge, Massachusetts private polling firm. 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.

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. Further, in addition to these omissions, there is also no meaningful geographical data in the defendant's submission. Were there any city/town quotas? Within cities,

were there ward quotas? Is it possible that all of the respondents from Fall River, for example, resided in a single ward? Overrepresentation of particular wards could, of course, significantly skew the results - especially with a sample size of .07% of the total county population. Finally, were any follow-up questions asked? If not, why not? A statewide Suffolk poll asked similar questions about a criminal defendant in another well-publicized case and obtained similar results. However, when people were asked whether the defendant in that case could get a fair trial in Massachusetts, a strong majority indicated their belief that he could.[6] All of these omissions from the data set seriously undermine its utility and materiality.

These problems are exacerbated by the survey technique used here.[7] In his initial filing, the defendant asserted that the

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[6] http://www.suffolk.edu/news/17110.php#.VDS12GSwIdI (date visited: October 7, 2014).

[7] In addition to the flawed statistical technique, the survey was presented to respondents in a misleading manner. According to the survey questionnaire provided to the Commonwealth following the Court's order on discovery, the survey was introduced to respondents as a call placed to them "on behalf of ADG, a national research firm." This is obviously untrue and misleading. The survey, it was claimed, was an "opinion poll of Massachusetts residents on issues facing the state and that [the respondent had] been randomly selected to participate." This is obviously untrue and misleading. The survey questionnaire and results provided to the Commonwealth are attached as Exhibit 1 to this opposition.

preferred[8] randomized sample (RDD) approach had been used to conduct the survey. Then, when the Commonwealth pressed for access to information regarding the survey methodology (an effort the defendant opposed in a written opposition), the defendant was forced to admit that, in fact, a "third-party vendor" had actually used a "listed sample" method (in which a list of telephone numbers is identified on a non-random basis) for assembling the survey group. However, no information whatsoever has been provided as to the method used to create the survey lists. Needless to say, this casts serious doubts on the objectivity, and so the reliability, of the survey results. It also makes the foregoing omissions relating to geographical data all the more significant.

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.

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[8] Selection methods not based on probability sampling are generally disfavored because each item in the population does not have a known and specified (nonzero) probability of being selected. Many experts believe that results surveys cannot be interpreted with confidence unless probability sampling is used. http://oig.ssa.gov/sites/default/files/audit/full/html/96-51142.html#ESTABLISHING MANAGEMENT CONTROLS (date visited, October 8, 2014).

Further, there was absolutely no evidence to suggest that the percentages cited by the defendant would be different in other counties.[9] Indeed, if the defendant believes that an ideal venue would lie "outside the likely reach of the Boston media market," then Bristol County, in the Providence-New Bedford TMA, as noted already, might actually test better than other counties in this regard. The fact that the defendant's filing and subsequent disclosures are devoid of any similar polling in the counties that he claims are superior to Bristol amplifies the validity of the Commonwealth's analysis. This information was never sought because of the certainty of outcome or it exists and hasn't been provided to the Commonwealth or the Court. Either way the defendant cannot show that the target counties are somehow superior to Bristol County in this regard. The same critiques apply with equal force to the percentage cited for respondents who are following the defendant's case "closely or very closely." Similar percentages might be achieved for any number of significant news stories. Without control data - a staple of

[9] With respect to this issue, the Court should take note of the significant percentage of materials contained in the exhibits attached to the defendant's motion generated by national news sources, including notably CNN and *Rolling Stone*. It is by no means clear how national news reports, with no particular Bristol County nexus, are in any way relevant to the issue now before the Court. Indeed, to the extent that these national news stories have disseminated facts and opinions about the case widely, they actually strengthen the argument for denying the defendant's motion.

statistical analysis of any kind - it is simply impossible to say.

Finally, and perhaps most important, the poll suffers generally from a fatal defect: an impermissibly low response rate. Specifically, the response rate overall was an astonishingly low 4.1%.[10] This was likely attributable, at least in part, to the very short field period (i.e. the time period over which the survey was conducted, here one or two days), which itself might independently tend to produce unreliable results.[11] Even among those actually contacted, only a tiny

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[10] The sample contained 9,968 persons and 409 persons participated in the survey, yielding a response rate of 4.1%. This is a maximum figure. If the 143 persons who started but did not complete the entire survey are excluded, the response rate drops to 2.7%. The defendant misrepresents the response rate at 12.9%, but fails to explain his method of calculating that result. He also endeavors to mask the response rate by failing to include the number of responses in his table setting out the other figures relating to the mechanics of the survey in his response to the Commonwealth's discovery request. The defendant's survey makes no attempt to determine whether the respondents are qualified jurors. Thirty-seven respondents are not registered to vote. No effort was made to determine eligibility to vote or if the failure to be registered also relates to ineligibility for jury service. Because the defendant cannot say anything about this cohort of respondents his actual beginning sample size cannot be larger than 370. With this as a starting point, the defendant's actual completion rate was 2.2%. The defendant's disclosure in response to information regarding respondents is attached as Exhibit 2 to this opposition.

[11] http://books.google.com/books?id=AggmwillPpAC&pg=PA76&lpg=PA76&dq=short+field+period+survey+problems&source=bl&ots=QDwqjPJ0PA&sig=w4SCIsblZ98pQ1XvMNWUrp9_kaM&hl=en&sa=X&ei=Skw1VKiJC87isASKpoK4Bg&ved=0CEEQ6AEwBQ#v=onepage&q=short%20field%20period%20survey%20problems&f=false, pp.76-78 (date visited, October 8, 2014).

number completed the survey. Of a total of 9,968 people in the sample, only 4,443 people were actually contacted. Of that number, 409 ultimately participated in the survey. This yields a completion rate, among those actually contacted, of only 9.2%.[12] Such low response and completion rates violate universally accepted industry norms and effectively render the results of the poll invalid.[13]

According to the statistical policies of the US Office of the Inspector General:

> It is expected that data collections based on statistical methods will have a response rate of at least 75 percent. Proposed data collections having an expected response rate of less than 75 percent require a special justification. Data-collection activities having a response rate of under 50 percent *should be terminated*. Proposed data-collection activities having an expected response rate of less than 50 percent will be disapproved.[14]

The notion that low response rates might produce unreliable results is only a matter of common sense: the lower the response rate, the less random the sample. For example, during

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[12] The defendant has made it very difficult to cull these crucial response figures from the data that he provided by failing, *inter alia*, to compute the rates according to the appropriate AAPOR formula. The Commonwealth has employed best efforts to extrapolate these essential figures from the sparse information produced in response to the Commonwealth's discovery request.

[13] The very low response and completion rates make the failure to contact the sample via the preferred RDD method even more problematic, compounding as they do potential biases attributable to potentially poor randomization of the initial sample resulting from the use of a listed sample approach.

[14] http://oig.ssa.gov/sites/default/files/audit/full/html/96-51142.html#ESTABLISHING MANAGEMENT CONTROLS (date visited, October 8, 2014).

certain days of the week and certain times of day, young people or people who watch more television programming might be more or less likely to be available for a survey. For this reason, long field periods with high response rates always tend to produce more reliable results.[15] As to the completion rate among those contacted, a low yield will inevitably oversample individuals who have strong feelings about the subject matter of the poll. For example, in the present case, it might be expected that persons who had followed the defendant's case closely would be more likely to participate in a voluntary survey about the case. It is precisely for such reasons that every reputable pollster adheres to the industry-accepted guidelines for response rates. The fact the survey here did not conform to these norms renders the results worthless and calls into question the reliability of the defendant's pollster.

Exacerbating the foregoing methodological defects was the blatantly biased manner in which these unreliable poll results were interpreted and presented to the Court. For example, the defendant asserts in his motion that "two-thirds (66%) of Bristol County residents are following the defendant's case closely." In reality, 78% are following the case "somewhat closely" (45%), "not very closely" (19%) or "not at all closely"

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[15] For more information on basic definitions of these terms, see http://www.aapor.org/Response_Rates_An_Overview1.htm#.VDVLv2SwIdJ (date visited, October 8, 2014).

(14%). Only 22% are following the case "very closely." This paints a very different picture than the defendant's bald assertion that two-thirds of Bristol County residents are "following the case closely." It would have been more accurate to say that 78% of Bristol County residents are not following the case "very closely." Similarly, 74% of Bristol County residents know only a "little," (48%) "not much" (17%) or "nothing at all" (9%) about the case. The defendant's distortions of the poll data in his submission do little to inspire confidence in an already discredited survey.

However, even if the defendant's poll results are taken at face value - notwithstanding the complete absence of any of the traditional hallmarks of reliability - the results by no means persuasively demonstrate that the media coverage has contained prejudicial information that prospective jurors could not reasonably be expected to ignore in their deliberations. Indeed, "[s]carcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits" of a widely-publicized criminal case such as this one. See Irvin, 366 U.S. at 722-23. The only relevant legal question is not whether some percentage of potential jurors have already formed opinions about the case, but rather whether, through the use of screening questionnaires and voir dire, twelve fair and

impartial jurors can be found among the half-million residents of Bristol County.

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 measure of prejudgement attributable to pre-trial publicity is present here, screening questionnaires and voir dire would be sufficient to "detect and defuse juror bias" and ensure a fair trial. See Skilling, 561 U.S. at 381, 385.

Conclusion. In short, the defendant has not proven that this is one of those rare and extraordinary cases for which a presumption of prejudice is warranted. See Skilling, *supra* at 381; United States v. Quiles-Olivo, 684 F.3d 177, 182 (1st Cir. 2012). Although the media coverage in this case has been

extensive, at this stage the defendant has failed to show that it has so inflamed and pervasively prejudiced the pool that a fair and impartial jury cannot be empaneled in Bristol County - or, alternately, that a better venire exists elsewhere. Indeed, along those lines, the defendant claims he wants a venue outside the Metro Boston TMA - he has precisely that in Bristol County. The defendant's polling data, failing as it does to conform to universally accepted standards of reliability, certainly provides no meaningful evidence of irremediable prejudice among the venire.

It will be possible to conduct a thorough evaluation of potential jurors in the pool through questionnaires and voir dire. Those procedures will be more than sufficient to identify and eliminate prejudice among the jury, see Skilling, *supra* at 384 ("extensive screening questionnaire and follow-up voir dire were well suited" to screening jurors for possible prejudice), and may be tailored by the trial judge to the unique demands of the case and community. This is as it should be. "When pretrial publicity is at issue, 'primary reliance on the judgment of the trial court makes [especially] good sense' because the judge 'sits in the locale where the publicity is said to have had its effect' and may base her evaluation on her 'own perception of the depth and extent of news stories that might influence a juror.'" Skilling, *supra* at 386 (quoting

Mu'Min v. Virginia, 500 U.S. 415, 429 (1991); accord Bishop v. Wainwright, 511 F.2d 664, 666 (5th Cir. 1975) ("trial court is necessarily the first and best judge of community sentiment").

Needless to say, if, after voir dire, the judge determines that it is impossible to seat an impartial jury, the question of change of venue may be revisited. Indeed, nothing would preclude the Court from taking remedial action, if required, at that time. See United States v. Haldeman, *supra* at 61 ("[If] an impartial jury actually cannot be selected, that fact should become evident at the voir dire . . . [at which time] [t]he defendant will then be entitled to any actions necessary to assure that he receives a fair trial"). See also United States v. Abbott Laboratories, 505 F.2d 565 (4th Cir. 1974), cert. denied, 420 U.S. 990 (1975); Wansley v. Slayton, 487 F.2d 90, 92-93 (4th Cir. 1973), cert. denied, 416 U.S. 994 (1974). For

all of the foregoing reasons, the defendant's motion should be DENIED.

RESPECTFULLY SUBMITTED,

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Dated: October 10, 2014

Introduction: Good evening. My name is _____ calling on behalf of ADG, a national research firm. We are conducting an opinion poll of Massachusetts residents on issues facing the state and you have been randomly selected to participate. I assure you that your answers will be kept completely confidential and this is not a sales call – we are only interested in your opinions. May I please speak to the youngest (MALE/FEMALE) 18 years of age or older in your household?

1. Are you registered to vote in Massachusetts?

Yes	90%
No	10%

If "Yes" in Q2, Ask Q3 & Q4:

2. When it comes to voting, with which party do you consider yourself to be affiliated?

	n=370
Democratic party	33%
Republican party	14%
Independent/Unenrolled with a major party	51%
Don't know	3%

3. In November, there will be a general election in Massachusetts for Governor, Treasurer, State Representative and ballot initiatives, among other races. How likely is it that you will vote in this general election in November? Will you definitely be voting, will you probably be voting, are you 50-50, or do you think you probably won't be voting in this election?

	n=370
Definitely be voting	62%
Probably be voting	18%
50-50	12%
Probably won't be voting	6%
Don't know/Refused	1%

4. In general, would you say things in Massachusetts are headed in the right direction or are they off on the wrong track?

Right direction	42%
Wrong track	39%
Mixed (vol.)	13%
Don't know	6%

5. On a scale from 0 to 10, where 0 means you are not a sports fan at all, and 10 means you consider yourself to be an avid sports fan – what kind of sports fan do you consider yourself to be?

NET: Not sports fan	**23%**
0 - Not at all enthusiastic	13%
1	3%
2	6%
NET: Neutral +/-	**43%**
3	6%
4	3%
5	14%
6	8%
7	12%
NET: Avid sports fan	**34%**
8	10%
9	5%
10 - Extremely enthusiastic	20%
Don't know/Refused	*

6. A little more than a year ago, in June 2013, former New England Patriots football player Aaron Hernandez was arrested and charged with the first degree murder of Odin Lloyd. How closely would you say you have been following the news about this case?

NET: Closely	**66%**
Very closely	22%
Somewhat closely	45%
NET: Not closely	**33%**
Not very closely	19%
Not at all closely	14%
Don't know	1%

7. Would you say you know a lot, a little, not much, or nothing at all about the case surrounding Aaron Hernandez and the murder of Odin Lloyd?

A lot	26%
A little	48%
Not much	17%
Nothing at all	9%
Don't know	1%

8. Which of the following statements is closest to your own view about this case?

I'm certain that Aaron Hernandez is guilty of first degree murder; nothing could persuade me otherwise	14%
I'm not 100% certain, but I think that Aaron Hernandez is probably guilty	59%
I'm not 100% certain, but I think that Aaron Hernandez is probably not guilty	5%
I'm certain that Aaron Hernandez is not guilty of first degree murder; nothing could persuade me otherwise	1%
Don't know	21%

If Q8 = "Probably guilty," "Probably not guilty," or "Don't know" ask:

9. It's been reported than Aaron Hernandez associated with individuals who have been arrested and charged with crimes associated with guns, drugs and gang activity. Does this information make you more likely to think he's guilty of murder in this case, less likely – or does this information not make a difference in your judgment either way?

	n=348
More likely	38%
Less likely	2%
No difference	56%
Don't know	4%

From which of the following sources, if any, have you heard or read about this case?

10. Friends or family members

Yes	39%
No	61%
Don't know	*

11. TV News

Yes	90%
No	10%
Don't know	-

12. Talk radio stations

Yes	41%
No	59%
Don't know	*

13. Radio news

Yes	60%
No	40%
Don't know	*

14. Print or online editions of local or Boston-based newspapers

Yes	55%
No	44%
Don't know	1%

15. Print or online editions of national newspapers

Yes	45%
No	55%
Don't know	1%

16. Social media, such as Facebook, Twitter, blogs or other sites

Yes	33%
No	67%
Don't know	*

Next, I am going to name the four major sports teams in Boston, after each, please tell me if you're a fan of them or not.

17. The Boston Red Sox. Would you say that you are an avid fan, a casual fan, not much of a fan, or definitely not a fan of the Red Sox?

Avid	32%
Casual	40%
Not much	14%
Not a fan	13%
Don't know	*

18. The Boston Celtics. Would you say that you are an avid fan, a casual fan, not much of a fan, or definitely not a fan of the Celtics?

Avid	13%
Casual	40%
Not much	20%
Not a fan	26%
Don't know	1%

19. The New England Patriots. Would you say that you are an avid fan, a casual fan, not much of a fan, or definitely not a fan of the Patriots?

Avid	43%
Casual	33%
Not much	10%
Not a fan	14%
Don't know	*

20. The Boston Bruins. Would you say that you are an avid fan, a casual fan, not much of a fan, or definitely not a fan of the Bruins?

Avid	28%
Casual	34%
Not much	18%
Not a fan	20%
Don't know	1%

21. When it comes to most political issues, do you think of yourself as a...?

Liberal	28%
Moderate	40%
Conservative	32%

22. What was the last grade you completed in school?

0-11	5%
High school grad	26%
Technical/Vocational	4%
Some college	19%
College grad	30%
Graduate degree	16%
Refused	1%

23. The next question is about the total income of YOUR HOUSEHOLD for the PAST 12 MONTHS. Please include your income PLUS the income of all members living in your household (including cohabiting partners and armed forces members living at home).

$50,000 or less	25%
More $50,000 but less than $75,000	17%
More $75,000 but less than $100,000	14%
More $100,000 but less than $150,000	12%
More $150,000	8%
Don't know	4%
Refused	21%

24. Are you now married, widowed, divorced, separated, never married, or living with a partner?

Married	59%
Never married	17%
Widowed	7%
Divorced	7%
Living with partner	6%
Separated	3%

25. Which of the following is your race or origin?

White	87%
Hispanic, Latino or Spanish origin	3%
Black or African American	2%
American Indian or Alaska Native	1%
Asian	1%
Native Hawaiian or other Pacific Islander	*
Some other race	2%
Refused	4%

26. Age

18-34	25%
35-44	19%
45-54	21%
55-64	16%
65+	17%
Refused	2%

27. For confirmation purposes, can you please tell me the city or town in Massachusetts you live in?

Acushnet	2%
Attleboro	11%
Berkley	2%
Dartmouth	7%
Dighton	1%
Easton	3%
Fairhaven	3%
Fall River	19%
Freetown	1%
Mansfield	5%
New Bedford	14%
North Attleboro	3%
Norton	4%
Raynham	2%
Rehoboth	1%
Seekonk	2%
Somerset	4%
Swansea	3%
Taunton	8%
Westport	4%

28. Gender

Male	47%
Female	53%

###

Please see the "Top Line" results for the survey produced herewith. In addition, please be advised as follows:

Survey Cooperation (Completion) Rate = 12.9%

Contact Rate = 17.9%

Refusal Rate = 49.2%

The number of respondents with whom contact was attempted for the purpose of the survey = 9,968

The number of respondents who were actually contacted = 4,443

The number of respondents who refused to participate = 2,409

The number of persons who failed to complete the survey = 143

Very truly yours,

/s/ Michael K. Fee

Michael K. Fee
Counsel to Defendant Aaron Hernandez

Exhibit 2

CERTIFICATE OF SERVICE

I, Patrick O. Bomberg, certify that I have served a copy of the Commonwealth's Opposition to Defendant's Motion for Change of Venue by first class postage prepaid mail to Counsel for the Defendant, as follows: Charles W. Rankin, Rankin & Sultan, 151 Merrimac Street, 2nd Floor, Boston, MA 02114; James L. Sultan, Rankin & Sultan, 151 Merrimac Street, 2nd Floor, Boston, MA 02114; and Michael K. Fee, Latham & Watkins, LLP, John Hancock Tower, 20th floor, 200 Clarendon St., Boston, MA 02116.

Signed under the pains and penalties of perjury this 10th day of October 2014.

COMMONWEALTH OF MASSACHUSETTS,

Patrick O. Bomberg
Assistant District Attorney
For the Bristol District
888 Purchase Street
New Bedford, MA 02741-0973

The Commonwealth of Massachusetts

OFFICE OF THE

DISTRICT ATTORNEY

BRISTOL DISTRICT

C. SAMUEL SUTTER
DISTRICT ATTORNEY

Fall River Justice Center
186 S. Main St.
Fall River, MA 02721
(774) 627-1600

October 10, 2014

Superior Court Clerk's Office
Fall River Justice Center
186 South Main Street
Fall River, MA 02720

Re: Commonwealth v. Aaron Hernandez
BRCR2013-00983

To whom it may concern:

Enclosed for filing, please find the Commonwealth's Opposition to Defendant's Motion for Change of Venue.

Respectfully submitted,

Patrick O. Bomberg
Assistant District Attorney

cc: Charles W. Rankin, Esq.
James L. Sultan, Esq.
Michael K. Fee, Esq.