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6 Attorney for Plaintiff

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 FOR THE COUNTY OF KINGS

9 THE PEOPLE OF THE STATE OF)
10 CALIFORNIA,)

11 Plaintiff,)

12 vs.)

13 TODD DOUGLAS PATE,)

14 Defendant(s).)

No. 13CM3538HTA

**OPPOSITION TO MOTION FOR
CHANGE OF VENUE**

Date: April 18, 2017

Time: 8:15 A.M.

Place: Dept. 5

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16 The People hereby oppose the motion to change venue on the following grounds: this
17 motion lacks merit as there is no showing of reasonable likelihood that defendant will be denied a fair
18 and impartial jury in this county.

19 This opposition is based on this notice and the attached memorandum of points and
20 authorities.

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22 Dated: April 11, 2017

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24 PHIL ESBENSHADE
25 Managing District Attorney
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MEMORANDUM OF POINTS AND AUTHORITIES

THE DEFENDANT HAS FAILED TO SHOW A REASONABLE LIKELIHOOD THAT HE WILL NOT RECEIVE A FAIR AND IMPARTIAL JURY IN THIS COUNTY

Defendant, in his motion, contends that the court should change venue, yet he has failed to establish that he will not receive a fair and impartial jury. The party seeking a change of venue must show that there is a "reasonable likelihood that a fair and impartial trial cannot be had in the County." (Cal. Pen. Code 1033.) "Reasonable likelihood" has been construed to require something less than "more probable than not" but more than "merely possible." (*Powell v. Superior Court*, 232 Cal. App.3d 785, 793.)

Defendant correctly notes that current law sets out a five part test to decide if a change of venue is appropriate in a given case. The five factors include:

1. The nature and gravity of the offense;
2. The nature and extent of news coverage;
3. The size of the community;
4. The status of the defendant in the community; and
5. The popularity and prominence of the victim.

Here, the five factors do not support change of venue. First, this is a Murder case; one of many filed each year in this County.

Second, news coverage has been limited to one newspaper and the occasional television news broadcast. A change of venue may be indeed appropriate when news coverage surrounding the crime charged is extensive, inflammatory and sensational. (See, e.g., *In re Miller* (1973) 33 Cal.App.3d 1005.) In contrast, a change of venue is properly denied when the media coverage is largely factual and decreases over time. (*People v. Farley* (2009) 46 Cal.4th 1053, 1083; see *Murphy v. Florida* (1975) 421 U.S. 794, 800, fn. 4, [the United States Supreme Court "distinguished largely factual publicity from that which is invidious or inflammatory"]; *Beck v. Washington* (1962) 369 U.S. 541, 556, [the High Court noted that "[e]ven the occasional front-page items were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness"]; see also, *People v. Hart* (1999) 20 Cal.4th 546, 599 [California Supreme Court

1 noted the trial court found the reporting to be neutral, not inflammatory, and insufficient to sway
2 public opinion]; accord *People v. Rountree* (2013) 56 Cal.4th 823, 838.) óMedia coverage is not
3 biased or inflammatory simply because it recounts the inherently disturbing circumstances of the
4 case.ô (*People v. Harris* (2013) 57 Cal.4th 804, 826.) Here, as noted by Defendant on page 3, items
5 1 through 36 of his motion, the headlines cited are largely factual, neutral, and not inflammatory.
6 Defendant further contends that statements by the elected District Attorney in a single newspaper
7 article are prejudicial, but he fails to provide any case law, on point or otherwise, to support his claim
8 that such comments on the procedural nature of a case are prejudicial.

9 As to the size of the community, Kings County is indeed rural and small. However,
10 that will not impact the defendant's ability to select an impartial jury, and his moving papers fail to
11 demonstrate *any* link between the small size of Kings County and his ability to have a fair trial.

12 Turning to factors four and fiveò the defendant's status in the community and his
13 prominence or popularity, he was not a celebrity, community leader, elected official, nor business
14 owner. He was an employee of an out-of-County business who worked primarily from his home.

15 Finally, Defendant cites four articles about the victim, Melanie Pate, all of which were
16 published in September of 2013, including one article where Melanie Pate is referred to as an óAngel
17 in the Outfield.ô In a change of venue motion, to be weighed along with the status of the defendant,
18 is the element of popularity and prominence of the victim. The typical change of venue case involves
19 a victim with some suggestion of prominence. (See, e.g., *People v. Williams* (1989) 48 Cal.3d 1112
20 [member of a prominent family in the community], But the fact that a victim, previously unknown to
21 the majority of the community, becomes prominent because of publicity surrounding his or her death,
22 however, does not weigh in favor of a change of venue. (*People v. McCurdy* (2014) 59 Cal.4th
23 1063, 1079; *People v. Webb* (1993) 6 Cal.4th 494, 514-515.)

24 Nor is change of venue required because the death of victims evokes great sympathy within
25 the community. Sympathy for a victim does not invariably demonstrate antipathy for the defendant.
26 (*Maine v. Superior Court, supra*, 68 Cal.2d at p. 385.) óProspective jurors would have reason to
27 sympathize with the victims and their families wherever the case was tried.ô (*People v. Pride* (1992)
28 3 Cal.4th 195, 225; see also *People v. Edwards* (1991) 54 Cal.3d 787, 807-808; *People v. Harris*
(1981) 28 Cal.3d 935, 948-949.) óSome degree of juror identification with the victims would occur
in any venue. (See *People v. Webb* (1993) 6 Cal.4th 494, 515 [õAny sympathetic features of the case
would be apparent wherever it was triedö].)ô (*People v. Farley* (2009) 46 Cal.4th 1053, 1084.)

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2 **ALTERNATIVELY, THE COURT SHOULD DEFER RULING ON A CHANGE OF VENUE**
3 **UNTIL JURY SELECTION**

4 The court should defer ruling on the defendant's change of venue motion until the end of
5 jury selection. Voir dire of the venire, specifically the jurors actually selected, often provides the best
6 evidence whether there is a reasonable likelihood that a fair and impartial trial cannot be held in the
7 county. (Pen. Code, § 1033, subd. (a); see *Maine v. Superior Court* (1968) 68 Cal.2d 375, 380, [it
8 has long been the practice to permit the trial court to defer its final ruling on a motion for a change
9 of venue until the jury is empaneled]; see also *People v. Leonard* (2007) 40 Cal.4th 1370, 1396
10 [jurors selected to try this case bear out the trial court's conclusion that an unbiased jury could be
11 found].)

12 This is particularly true, when an alleged ground for change of venue is exposure of
13 potential jurors to media coverage. In one reported case, change of venue was properly denied
14 because the jurors' ignorance of the pretrial publicity is a very strong indication that defendant was
15 not tried by a biased jury. (*People v. Salas* (1972) 7 Cal.3d 812, 818-819 [Eight of the twelve
16 jurors did not recall reading or hearing about the case and the recollection of the remaining four was
17 so dim as to be negligible].) In another case, [t]he jury voir dire bore out the trial court's
18 conclusion that a fair jury could be chosen. Each juror assured the trial court that he or she could be
19 unbiased notwithstanding exposure to media reports about the case. (*People v. Lewis* (2008) 43
20 Cal.4th 415, 450.) Finally, the jury selection process itself is designed to weed out potential jurors
21 with biases caused by pretrial publicity.

22 **CONCLUSION**

23 The People contend that a request for change of venue is not only premature, but
24 unnecessary. Defendant has not submitted any public opinion surveys, comments by Kings County
25 citizens, nor any statements from members of the potential juror pool as to any feelings regarding
26 publicity in support of his contention that there is a reasonable likelihood that a fair and impartial trial
27 cannot be had in Kings County. Defendant simply cites headlines from numerous newspaper articles,
28 some three years or more old, and assumes that a large majority of Kings County residents have read
a Hanford newspaper, and were influenced or biased by said coverage. Absolutely no discernible
proof has been presented on the issue other than speculation.

1 Quoting from *Irvin v. Dowd* (1961) 366 U.S. 717, at page 732, the California Supreme Court
2 maintains:

3 It is not required ã that the jurors be totally ignorant of the facts and issues
4 involved. In these days of swift, widespread and diverse methods of communication, an
5 important case can be expected to arouse the interest of the public in the vicinity, and
6 scarcely any of those best qualified to serve as jurors will not have formed some impression
7 or opinion of the merits of the case. This is particularly true in criminal cases. To hold that
8 the mere existence of any pre-conceived 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.ô

9 (*People v. Harris* (1981) 28 Cal.3d 935, 949-950; see also *People v. Davis* (2009) 46 Cal.4th 539,
10 575; *People v. Howard* (1992) 1 Cal.4th 1132, 1169-1170.)

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12 In sum, the defense motion is not only premature, but fails to establish that any of the
13 *relevant* factors support a change of venue. Thus, the court should deny the motion.
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15 Dated: April 10, 2017

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18 Phil Esbenshade
19 Managing District Attorney
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