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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF FRESNO

10 THE PEOPLE of the
11 State of California,

12 Plaintiff,

13 vs.

14
15 MARCUS DELON WESSON,

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17
18 Defendant.

)
) CASE NO.: F04901785-6
)
) RENEWED MOTION
) TO CHANGE VENUE
)
)
)
) DATE: March 1, 2005
) TIME: 9:00 a.m.
) DEPT.: 53
) EST. TIME: One Hour
) Defendant in custody; Transportation
) Order requested.

19 TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT
20 AND TO THE DISTRICT ATTORNEY OF FRESNO COUNTY:

21 PLEASE TAKE NOTICE that on March 1, 2005, at 9:00 a.m., or as soon
22 thereafter as the matter may be heard in Department 53 of the above-entitled
23 court, the defendant, Marcus Delon Wesson, will move this court for an order
24 transferring the trial of this case to a court in another county.

25 This motion will be made on the ground that there is a reasonable
26 likelihood that an impartial trial of this matter cannot be had in this county.

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1 On September 13 and 14, 2004, the defendant, Marcus Wesson, moved
2 to have his jury trial transferred from Fresno County on the grounds that it was
3 reasonably unlikely a fair trial could be provided in this venue. Said motion was
4 denied without prejudice and a trial was set to commence on January 24, 2005
5 with a jury panel to be assembled on January 25, 2005.

6 On January 25, 2005, several hundred jurors were in attendance at the
7 Fresno County Plaza Ballroom. Other than those claiming hardships at that
8 time, all prospective jurors filled out questionnaires. Hardship applicants, whose
9 claims were not immediately denied, also filled out questionnaires.

10 A total of 330 questionnaires were turned in, and individual "Hovey" voir
11 dire commenced on February 2, 2005. This voir dire was open to the public and
12 to representatives of the media. (Defendant's motion to close this portion of the
13 voir dire process was denied.)

14 The hope that in a county the size of Fresno publicity might recede with
15 the passage of time has not been fulfilled. To the contrary, media coverage
16 continues to be more expansive and sensational than even defense counsel
17 previously forecasted. The theory that a group of prospective jurors will be
18 available who have not formed any biases and will not be exposed to community
19 pressure and public scrutiny has proven to be false.

20 In fact, the following conditions have arisen since the previous change of
21 venue motion was denied that support a reconsideration of that motion at this
22 time:

- 23 1) Media coverage has become almost daily in the local newspaper
24 and on local television and radio stations. This coverage will
25 unquestionably intensify once a jury is impaneled to judge the "Worst
26 Mass-Murder" in Fresno County's history. Exhibit A1 includes Fresno
27 Bee articles written about this case since the previous venue motion.

1 2) This coverage will become increasingly prejudicial and negative.
2 One popular prime-time talk show¹ (KMJ/580) featuring "Jazz McKay,"
3 has covered this case on a regular basis. On this show, Mr. McKay (as
4 well as people calling in) routinely declare Mr. Wesson to be guilty. On
5 the evening of February 2, 2005 (the first day of voir dire), Mr. McKay
6 announced, "As far as I'm concerned, Marcus Wesson, you're guilty as
7 sin. You are guilty as sin whether you pulled the trigger or not, sir, you
8 are guilty as sin." . . . and that he (Jazz) is "privy to an awful lot of spiritual
9 information. The Lord came to me and told me Marcus Wesson was
10 guilty as sin." He goes on to compare him to Charles Manson. (Exhibit
11 B1)

12 3) Ongoing priority television and radio coverage which has included
13 broadcasts of interviews with excused jurors has been aired. One
14 example of this coverage (which will also be the subject of another
15 concern) aired on February 2, 2005. (Exhibit C1) On February 14, 2005,
16 KFSN, Channel 30, aired footage of John Wayne Gacy, Charles Manson
17 and Jeffrey Dahmer and suggested jurors had been comparing the
18 defendant to these convicted murderers. (Exhibit D1 – to be lodged with
19 the Court.)

20 4) Statistics that can readily be tallied from the questionnaires and
21 the court transcripts of voir dire confirm both the defense and the
22 prosecution's survey results: Approximately 98% had heard or read
23 about the case before being called for jury duty. About three-fourths of
24 those admitted having discussed the case with family, friends, or co-
25 workers; about half admitted having formed an opinion about the case or
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27 ¹ Mr. McKay claims his show is the No. 1-rated evening radio program.
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1 having discussed the case with others who had formed an opinion.
2 Though many claimed they felt they could set aside their opinions, many
3 others candidly admitted it would be difficult to do so.

4 5) The gathering of prospective jurors in and of itself demonstrated
5 the prejudice and presumption of guilt that exists in the community.
6 Attorneys from defense counsel's office who were passing through the
7 line heard remarks being openly made. This prompted the contacting of
8 an investigator to go to the courtyard area of the County Plaza where the
9 prospective jurors had assembled. Sanford Glickman, a licensed private
10 investigator, arrived shortly before the last jurors had filed in and he, too,
11 overheard comments being made between jurors. (Exhibit E1)

12 Since these types of comments were being shared openly
13 amongst jurors (who apparently do not know one another) at points of
14 relatively brief encounters with defense staff, obviously much more of this
15 prejudicial conduct was going on.

16 6) The voir dire process has not always elicited honest responses
17 from prospective jurors. A classic example of this is Juror No. "A21" who
18 expressed strong views in favor of the death penalty which arguably
19 revealed a substantial impairment. In spite of her views, she claimed she
20 would be able to keep an open mind and consider both punishments.
21 She was excused on other grounds. As she was leaving the Courthouse,
22 she was interviewed by reporters on camera. The interview aired later
23 that night. During the interview this juror said, "I mean if he was found
24 guilty to that, I would definitely have to say, you got to give him the death
25 penalty." (Exhibit C1) (So much for life qualification.)

26 This episode substantiates two problems: 1) declarations to keep an
27 "open mind" and "follow the law" cannot be trusted when they follow written and
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1 verbal declarations of a strong bias, and 2) the community has an expectation
2 that the average juror will be reluctant to disappoint.

3 Nowhere was this pointed out more clearly than by Juror No. "I31's"
4 comments to Question Nos. 97 and 119, respectively: "But if you don't watch
5 TV or read newspapers, there is still public pressure from those who are still
6 reading and watching the news." And, "[t]he trial will be long, subject to much
7 publicity and the exertion of public opinion."

8 This process had already begun with a number of jurors who survived
9 defendant's challenge for cause. For example, Juror No. "E32" conceded that
10 people at work had said Mr. Wesson was guilty and that he should "fry" or be
11 "hanged, that general sense." He said he felt he could ignore them. This was
12 by no means an isolated example.

13 Interestingly, this juror (among others with similar reports in voir dire) did
14 not report this experience in their questionnaire. For examples, see Question 88
15 on E32, G37, and D41's questionnaire.

16 Defense counsel has been challenged by opposing counsel for
17 suggesting that jurors may not follow the Court's admonitions, or be forthcoming
18 when they found they were unable to do so. The reality is, in high profile cases
19 that elicit strong opinions and prejudicial feelings in the community, the risk is
20 considerable. Previous motions filed in this case have cited Circuit Court and
21 U.S. Supreme Court cases that recognize this inherent problem. (*Irvin v. Dowd*
22 (1961) 366 U.S. 717, 728; *U.S. v. Dillinger* (1972) 7th Circ. 472 F2d 340; *U.S. v.*
23 *Bear Runner* (1974) 8th Circ. 502 F2d 908.)

24 The defense is at a significant disadvantage at this juncture because it
25 must use peremptory challenges to excuse jurors who have a high risk of bias
26 due to the social pressures they have articulated, whereas the prosecution need
27 only exercise peremptory challenges for the usual reasons. Even if this were
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1 not the case, any jury impaneled in this venue will be quickly sensing that they
2 are in a fish bowl, and that the community is looking to them to voice its outrage
3 and its opinions.

4 Fresno City's Mayor, Alan Autry, has described this case as Fresno's own
5 "911." Locally, the media coverage during the trial will likely exceed the
6 coverage of that national tragedy because of local interest.

7 The defense need not show the probability a fair trial cannot be had in
8 this venue, only that there is a reasonable likelihood of such. As the State
9 Supreme Court observed in *Odle v. Superior Court* (1982) 32 Cal.3d 932, 944,
10 945:

11 While the propriety of a ruling on challenge for cause is governed
12 by ... statutes ..., the ruling on motion to change venue – the
13 analysis of a reasonable likelihood that a fair trial cannot be had in
14 the county – is separate from, and requires a far more searching
15 analysis than, the decision to qualify a particular juror. That each
16 juror is qualified under applicable statutes and, specifically, that no
17 juror fails to meet the [statutory] criteria ..., is not controlling. (See
18 *Irvin v. Dowd* (1961) 366 U.S. 717, 724-725.... Resolution of the
venue question requires consideration of the responses of jurors
who do not ultimately become members of the trial panel as well as
those who do. (See *Murphy v. Florida* (1975) 421 U.S. 794 ...; *Irvin*
v. Dowd, supra,

19 When viewing the panel as a whole, along with the gravity of the charges,
20 the nature and extent of the publicity, and the continuous association of Mr.
21 Wesson with some of the nation's most notorious serial killers, the conclusion
22 becomes clear. A reasonable likelihood exists that Mr. Wesson cannot receive
23 a fair trial in Fresno.

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1 This motion incorporates by reference all exhibits filed in the original
2 change of venue motion. Due to time constraints, not all media coverage that
3 might otherwise be available has been produced.

4 Dated: February 23, 2005

5 Respectfully submitted,

6 GEORGE CAJIGA
7 PUBLIC DEFENDER
8 COUNTY OF FRESNO

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10 By 
11 Peter M. Jones
12 Chief Defense Attorney

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TELEPHONE: 559-488-1682.**