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FRESNO COUNTY
SUPERIOR COURT
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12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE COUNTY OF FRESNO

14 THE PEOPLE of the)
15 State of California,) CASE NO.: F04901785-6
16)
17 Plaintiff,) NOTICE OF MOTION AND MOTION
18 vs.) FOR CHANGE OF VENUE [PENAL
19) CODE SECTION 1033];
20) DECLARATION OF COUNSEL
21)
22) DATE: August 20, 2004
23) TIME: 9:00 a.m.
24) DEPT.: 53
25) EST. TIME: One Day
26) Defendant in custody; Transportation
27) Order requested.
28)

29 TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT
30 AND TO THE DISTRICT ATTORNEY OF FRESNO COUNTY:

31 PLEASE TAKE NOTICE that on August 20, 2004, at 9:00 a.m., or as
32 soon thereafter as the matter may be heard in Department 53 of the above-
33 entitled court, the defendant, Marcus Delon Wesson, will move this court for an
34 order transferring the trial of this case to a court in another county.

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

37 _____/

ORIGINAL

1 The motion will be based on this notice of motion, on the attached
2 declaration, memorandum of points and authorities and exhibits, on the
3 public opinion survey and results administered and compiled by John Tinker,
4 Ph.D., and Edward Nelson, Ph.D. (CVs, Exhibit "A"; Survey, Exhibit "B"; Results,
5 Exhibit "C"), and on such other supplemental declarations, affidavits, exhibits,
6 and points and authorities as may hereafter be filed with the court, on all the
7 papers and records on file in this action, and on such oral and documentary
8 evidence as may be presented at the hearing of the motion.

9 **POINTS AND AUTHORITIES**

10 **I.**

11 **A SUPERIOR COURT MUST ORDER A CRIMINAL**
12 **ACTION PENDING BEFORE IT TRANSFERRED TO**
13 **ANOTHER COUNTY IF THERE IS A REASONABLE**
14 **LIKELIHOOD THAT THE DEFENDANT CANNOT**
15 **RECEIVE A FAIR TRIAL IN THE COUNTY WHERE**
16 **THE CHARGES HAVE BEEN FILED**

17 Penal Code section 1033 provides:

18 In a criminal action pending in the Superior Court, the Court shall
19 order a change of venue:

20 (a) On motion of the defendant, to another county when it
21 appears that there is a reasonable likelihood that a fair and
22 impartial trial cannot be had in the county. . . .

23 In Maine v. Superior Court of Mendocino County (1968) 68 Cal.2d 375,
24 383, the California Supreme Court declared:

25 A motion for change of venue or continuance shall be granted
26 whenever it is determined that because of the dissemination of
27 potentially prejudicial material, there is a reasonable likelihood that
28 in the absence of such relief, a fair trial cannot be had. This
determination may be based on such evidence as qualified public
opinion surveys or opinion testimony offered by individuals, or on
the court's own evaluation of the nature, frequency, and timing of

1 the material involved. A showing of actual prejudice shall not be
2 required.

3
4 **II.**

5 **A DEFENDANT NEED NOT ESTABLISH THE LIKELIHOOD
6 OF PREJUDICE BY A PREPONDERANCE OF THE EVIDENCE**

7 In Frazier v. Superior Court of Santa Cruz County (1971) 5 Cal.3d 287,
8 294-295, the Supreme Court held:

9 "[R]easonable likelihood" of prejudice does not mean that
10 prejudice must be "more probable than not"; . . . a defendant is
11 entitled [to a change of venue] "not only when a preponderance of
12 circumstances call for such a result, but also whenever a defendant
13 has shown even a 'reasonable likelihood' that he will not receive a
14 fair trial."

15 Stated another way, "the phrase 'reasonable likelihood' means something
16 less than 'more probable than not,' and something more than 'possible'."
17 (People v. Proctor (1992) 4 Cal.4th 499, 523.)

18 **III.**

19 **IN DETERMINING A MOTION FOR CHANGE OF VENUE,
20 THE COURT SHOULD CONSIDER (A) THE GRAVITY OF
21 THE OFFENSE, (B) THE POPULATION OF THE COUNTY,
22 (C) THE PROMINENCE OF THE VICTIMS, (D) DEFENDANT'S
23 LACK OF PROMINENCE, (E) THE EXTENT AND NATURE OF
24 PUBLICITY, AND (F) COMMUNITY REACTION TO THE
25 OFFENSES; NO INDIVIDUAL FACTOR IS DETERMINATIVE
26 OF THE MERITS OF THE MOTION**

27 **A. Gravity of the Offense:**

28 In Martinez v. Superior Court of Placer County (1981) 29 Cal.3d 574,
582-583, the Court observed: "[T]he term 'gravity' of a crime refers to its
seriousness in the law and the possible consequences to an accused in the
event of a guilty verdict. . . ."

1 Moreover, the fact that a county may have a large population, although a
2 relevant factor for consideration, can never be the sole factor in the
3 determination of the merits of the change of venue motion. In Smith v. Superior
4 Court of Los Angeles County (1969, 2nd Dist.) 276 Cal.App.2d 145, 150, 80
5 Cal.Rptr. 693, the Court noted:

6 . . . Los Angeles County has a population in excess of 7,000,000.
7 Carried to its logical conclusion, the district attorney's argument, if
8 valid, would require that all motions for a change of venue in Los
9 Angeles County must be denied because of its population,
10 regardless of the amount of pretrial publicity which surrounds a
11 notorious criminal case. The contention is disposed of by the court
12 in Maine in the following language: 'We do not intend to suggest,
13 however, that a large city may not also become so hostile to a
14 defendant as to make a fair trial unlikely.' (Maine v. Superior Court,
15 68 Cal.2d 375, 387, fn. 13.)

16 A change of venue from Los Angeles County was also required in Powell
17 v. Superior Court (1991) 232 Cal.App.3d 785.

18 Fresno County, with a population of approximately 760,000 is the tenth
19 largest county in California. It is substantially larger than Santa Cruz County,
20 but appreciably smaller than Los Angeles County. This factor would appear to
21 depend on the applicability of the other requirements for its relevance.

22 C. Prominence of the Victims:

23 The courts have recognized that the status of the victim is a factor that
24 can engender strong community sympathy. (Frazier v. Superior Court of Santa
25 Cruz County (1971) 5 Cal.3d 287.) But prominence is not necessarily reserved
26 to the status of the individual victim. In Martinez v. Superior Court of Placer
27 County (1981) 29 Cal.3d 574, 584, the Court observed:

28 . . . Although the trial court correctly stated that the victim was "no
public figure," his status nonetheless appears to be significant. At
the time of the murder, he was employed as a brakeman for the
largest single employer in the city. The victim's prominence in the

1 public eye thus derives from the status of his employer, and that
2 factor undoubtedly engendered community sympathy.

3 This factor is present in this case. Although the victims were unknown to
4 their community, generally the fact that seven of them were small children, and
5 that all nine were victims of the worst mass murder in Fresno County history,
6 has elevated their prominence exponentially. Furthermore, the seven younger
7 victims have been continually represented as the result of incestuous and
8 polygamous relationships between the defendant and his daughters and nieces.

9 D. Defendant's Lack of Prominence:

10 Defendant's lack of prominence in the community, especially when
11 compared to the status of the victims, or defendant's association with any group
12 that is generally not accepted by the mainstream community, is a significant
13 factor in the determination of a change of venue. (People v. Tidwell (1970) 3
14 Cal.3d 62, 70.) Mr. Wesson in contrast to the young innocent victims has been
15 vilified publicly as a cult leader who molested and married his daughters and
16 nieces. He is a poor African-American, who had only relocated to Fresno with
17 some of his extended family several years ago.

18 E. The Extent and Nature of Publicity:

19 The pervasiveness of media coverage, and the extent of
20 incriminating information disseminated, are strong factors in considering the
21 merits of a change of venue motion. (Smith v. Superior Court of Los Angeles
22 County (1969) 276 Cal.App.2d 145, noted:

23 . . . The circulation of the Los Angeles Times as of September 30,
24 1968 was 948,782 on weekdays, and 1,253,556 on Sundays. The
25 Los Angeles Times continued its coverage on an almost daily basis
up to the time the petition was filed before this court. . . .

26 . . . We have before us overwhelming evidence of publicity
27 concerning these charges.

1 In People v. Tidwell (1970) 3 Cal.3d 62, 70, the Court found:

2 [H]ere the press and public were apprised of virtually every detail
3 in the investigation of the crimes. . . .

4 Although there was no report of a "confession" per se, news of a
5 statement from defendant's brother Robert implicating defendant
6 did reach the press by way of the district attorney's public
7 explanation of the necessity for separate trials.

8 Likewise, in Frazier v. Superior Court of Santa Cruz County, supra, the
9 Court focused on the nature of the media coverage that was disseminated for
10 public consumption.

11 The Court in Griffin v. Superior Court of Stanislaus County (1972) 26
12 Cal.App.3d 672, 681, focused on whether the media presentation was factual or
13 emotionally biased, and concluded that even a balanced factual presentation
14 could produce a likelihood of unfairness:

15 It is true . . . that the newspaper reports were factual rather than
16 inflammatory. But '[a] reasonable likelihood of unfairness may exist
17 even though the news coverage was neither inflammatory nor
18 productive of overt hostility. . . .'

19 Numerous articles ran in the local paper since March 12, 2004 (Exhibit
20 D). The television coverage has been relatively consistent and proportional to
21 the newspaper coverage. One documentary on Channel KFSN portrayed Mr.
22 Wesson as someone who molested a friend and neighbor of the defendant's
23 wife when she was a child. The story was clearly contrived and speculative.

24 Of greatest concern is the anticipated extent of local media coverage
25 during the trial itself and the potential effect it could have on jurors. "With his
26 life at stake, it is not requiring too much that petitioner be tried in an atmosphere
27 undisturbed by so huge a wave of public passion." *Irwin v. Dowd* 366 U.S. 717,
28 728. The majority of the articles in the Fresno Bee have appeared on either
page A-1 or B-1 (Exhibit "E").

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F. Community Reaction to the Offense:

Fundamentally important to a change of venue determination is the emotional reaction of the community to the allegations facing the defendants. Frazier v. Superior Court, *supra*, 5 Cal.3d 287 at 293.

The animosity against anyone portrayed as a murderer of nine people, including eight children, and of decades-long sexual abuse and assault would understandably be considerable. This is particularly of concern where the defendant is viewed as the head of a bizarre cult analogous to that of Charles Manson and David Koresh.

A public survey was conducted (Exhibit B) and the results (Exhibit C) show 83.1% of those polled recognized Marcus Wesson by name without prompting. Of all survey respondents, 48.4% had formed the opinion that Mr. Wesson was guilty of murder and 52.8% had formed the opinion he was guilty of sex crimes.

While there is no magic number that mandates a change of venue, these statistics are consistent with cases where a change of venue was found to be required. People v. Williams 48 Cal.3d 1112, 1129.

Admittedly, public surveys have their limitations and are merely a general indicator of public awareness and opinion concerning a given subject matter.

In a criminal prosecution, all five factors must be carefully reviewed and weighed in assessing whether or not venue should be moved.

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DECLARATION OF PETER M. JONES

I, PETER M. JONES, am the attorney for the defendant, Marcus Delon Wesson.

In the course of preparing for trial in this case, I have reviewed reports, documents, potential exhibits, and items of physical evidence relating to the charges against the defendant.

I have submitted the survey and results of Edward Nelson, Ph.D., and John Tinker, Ph.D. In addition, I have submitted newspaper articles, and I am in the process of obtaining radio transcripts and news video footage from the local county media, which will be filed as additional exhibits and/or presented to the court at the hearing on this venue motion. The survey to determine public opinion showed over an 80% recognition of this case by those polled and approximately 50% of those polled had formed an opinion that Mr. Wesson was guilty.

Based on a review and study of all of the above matters, I am informed and believe and declare as follows:

1. The crimes charged against the defendant are especially grave. These include nine counts of first-degree murder with multiple murder special circumstances, and 14 counts of sexual assault and child molest charges. The death penalty is presumably being sought for Mr. Wesson.

2. The community in which the offenses were committed is somewhat provincial in that there is only one major newspaper which serves the county and five primary television stations with news bureaus which broadcast countywide.

3. The media coverage of these offenses was extensive and pervasive. It has been the lead story in the Fresno Bee and for local television Channels 21, 24, 26, 30 and 47 on numerous occasions, and it continues to

1 receive considerable coverage as it proceeds to trial. The trial will likely be
2 covered more extensively and in greater depth on a daily basis in this county
3 during trial than it would in another venue.

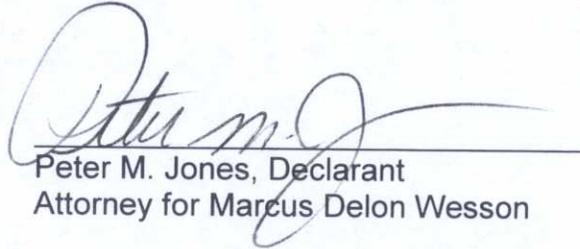
4 4. The defendant has been portrayed as a manipulative child
5 molester and child murderer by the media on an ongoing basis.

6 5. The victims were particularly vulnerable in that seven of them were
7 small children, the alleged product of incestuous and polygamous relationships.
8 The older victims, ages 17 and 25, were the defendant's own daughters.

9 6. This community has reacted to the offenses charged against the
10 defendant with prejudice and hostility.

11 I declare under penalty of perjury under the laws of the State of California
12 that the foregoing is true and correct.

13 Dated: August 9, 2004.

14
15 
16 Peter M. Jones, Declarant
17 Attorney for Marcus Delon Wesson

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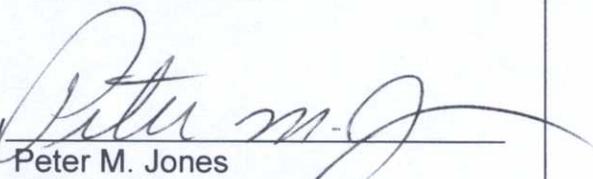
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CONCLUSION

Once the Court has received the additional evidence and, based on the foregoing authorities and declarations on information and belief, the defense respectfully requests that there be a finding that there is a reasonable likelihood Marcus Delon Wesson cannot receive a fair trial in Fresno County and that the case be transferred to another county for jury trial.

Dated: August 9, 2004.

Respectfully submitted,
GEORGE CAJIGA
PUBLIC DEFENDER
COUNTY OF FRESNO

By 
Peter M. Jones
Chief Defense Attorney

AFFIDAVIT OF PROOF OF SERVICE
(2009, 2015.5 C.C.P.)

State of California)
)
County of Fresno)

Comes now the undersigned, who hereby declares as follows:

I am a citizen of the United States of America and am employed in the county aforesaid. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is Public Defender's Office, County of Fresno, 2220 Tulare Street, Suite 300, Fresno, California 93721.

On the 9th day of August, 2004, I served a copy of the attached NOTICE OF MOTION AND MOTION FOR CHANGE OF VENUE [PENAL CODE SECTION 1033]; DECLARATION OF COUNSEL (with Exhibits relating to this motion bound separately and attached hereto) on the office of the District Attorney's Office of Fresno County, by delivering and depositing a true copy thereof with an employee of said office.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 9, 2004.

Jiffney Kuckenkaker

RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.
DATE: AUG 9 2004
BY: *Angie Boney*

RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.
DATE: _____
BY: _____

RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.
DATE: _____
BY: _____

NOTICE

ONLY PART OF THE DOCUMENT FILED WAS APPROVED FOR FILING ON THE COURT'S WEB SITE. THE ENTIRE DOCUMENT IS AVAILABLE FOR INSPECTION AND COPYING (AT THE REQUESTING PARTY'S EXPENSE) IN THE CRIMINAL CLERK'S OFFICE, B1 LEVEL OF THE CENTRAL COURTHOUSE. TELEPHONE: 559-488-1682.