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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

People of the State of California, Plaintiff, --vs.-- Antolin Garcia-Torres, Defendant.	Case No.: 213515 Reply to Opposition to Motion for Change of Venue

Issue Presented

1. A Court should order a change of venue when it determines it is reasonably likely that the defendant cannot get a fair trial in the county in which he is charged. Meeting this standard requires a level of proof that is lower than a preponderance of the evidence and all doubts should be resolved in favor of removal. This case presents the most serious of charges and consequence and the coverage has been extensive and prejudicial. Should the Court order a change of venue?

Memorandum of Points and Authorities

Argument

I. Consistent with California law and the defendant's constitutional rights, the venue for this trial should be changed.

A. This Court should not defer ruling on this motion until jury selection

This Court should not defer ruling on this motion; rather, it should grant it before jury selection. The Rules of Court explain that a trial court may consider attempting to impanel a jury before changing venue, but that it isn't required to do so. (Cal. Rules of Court, rule 4.151.) Indeed, the Advisory Committee comment says that the Rule "is not intended to imply that the court should attempt to impanel a jury in every case before granting a change of venue." (Cal. Rules of Court, rule 4.151 Advisory Committee comment.)

Deferring a ruling creates several problems that cannot be cured. For example, the defense is entitled to seek writ review should the motion be denied, but only before jury selection. (*Maine v. Superior Court* (1968) 68 Cal.2d 375.) Delaying ruling on the motion would effectively deny Mr. Garcia-Torres the right to review. Another practical problem is when the motion would be heard. For example, would it be heard after the first biased juror, the third, or the thirtieth?

Voir dire has its own limitations. As courts have explained, it is not always reliable to expect potential jurors to confess to bias. Jurors may falsely deny knowledge and prejudice so they can sit on the jury while others may say they will set aside their preconceptions but unconsciously be influenced by the media coverage. (*Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 879.) In addition, the process of exploring potential bias may itself serve to bias jurors who hear the questioning of their colleagues. The voir dire process would therefore lack reliability and could exacerbate the prejudice.

This Court can decide the motion on the basis of Dr. Bronson's testimony and the public opinion survey that was provided. The Supreme Court has approved the use of testimony and survey evidence since at least the late 1960's. "This determination [reasonable likelihood] 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 the material involved." (*Maine v. Superior Court, supra,* 68 Cal.2d at p. 383.) The survey offered in this case was ordered by Dr. Edward Bronson, the witness the defense intends to call at the hearing on the motion. Dr. Bronson has an impressive amount of experience in conducting qualified surveys and testifying in areas related to the impact of pre-trial publicity. He has offered opinions both in favor of changing venue and against in a variety of cases for the last several decades. The Court should hear his testimony and consider the survey and not defer ruling until voir dire. Waiting to decide would likely leave the issue to a future appeal and, as the Supreme Court said in *Maine*, "reversals are just palliatives . . . the cure lies in those remedial measures that will prevent the prejudice at its inception." (*Id.* at p. 324 (quoting *Sheppard v. Maxwell* (1966) 384 U.S. 333, 363.)

B. The balance of the relevant factors weighs in favor of changing venue

A motion for a change of venue should be granted whenever it is determined that there is a reasonable likelihood that a fair trial cannot be had absent the change. (*Id.* at p. 833; Pen. Code § 1033.) A reasonable likelihood has been defined as less than "more probable than not," but more than "merely possible." (*People v. Williams* (1989) 48 Cal.3d 1112, 1126; *People v. Bonin* (1988) 46 Cal.3d 659.) Actual prejudice need not be shown when, as here, the motion is brought before trial. (*People v. Williams, supra,* 48 Cal.3d at p. 1126.) Any doubt about the need for a change of venue must be resolved in favor of change when the issue is raised before trial. (*Williams v. Superior Court* (1983) 34 Cal.3d 584, 588.)

The question is not whether the Court could find 12 jurors and several alternates who might be qualified to serve. The analysis that goes into ruling a motion to change venue is different from the analysis of whether a jury should be excluded for cause.

> . . . the ruling on motion to change venue—the analysis of a reasonable likelihood that a fair trial cannot be had in the county—is separate from, and requires a far more searching analysis than, the decision to qualify a particular juror. That each juror is qualified under applicable statutes and, specifically, that no juror fails to meet the criteria of [Penal Code] section 1076, is not controlling. [citations omitted] 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. [citations omitted]
>
> *Odle v. Superior Court* (1982) 32 Cal.3d 932, 944

The prosecution brief addresses each factor and concludes that no one factor requires a change of venue. But that isn't how the factors are analyzed. As the Supreme Court has demonstrated, the analysis requires a court to consider all the factors and, even if no one factor is determinative, they may still show a reasonable likelihood the defendant cannot get a fair trial. (*Id.* at p. 588.) Indeed, the prosecution took the same approach in *Martinez v. Superior Court* and failed for the same reason. The Supreme Court explained that "Under the mandate of *Maine*, however, we must approach each case on an individual basis; each factor is worthy of consideration even if 'isolated and alone' it would not compel a change of venue." (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582 (citing *Maine v. Superior Court, supra,* 68 Cal.2d at p. 388.) It has also explained that "No one factor controls our determination that a change of venue is appropriate here; rather we weigh all the factors and, mindful of our duty, resolve all doubts in favor of petitioner [defendant]." (*Id.* at p. 585.)

In addition, the prosecution brief cites cases that were decided on appeal. The standard in those cases required actual prejudice. Pre-trial motions are not decided using the same standard. On the contrary, the proper standard is reasonable likelihood. Therefore, the cases cited are tangentially relevant, but not controlling.

1. Nature and Gravity of the Offense

The nature and gravity of the case factor supports changing the venue. The peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community, define its 'nature'; the term 'gravity' refers to its

seriousness in the law...." (*Martinez v. Superior Court, supra,* 29 Cal.3d at p. 582.) The prosecution argues that this factor doesn't require a venue change and cites to cases with bad facts where venue wasn't changed. But simply citing to those case isn't an argument when the defense can cite to cases where venue was changed. For example, the Supreme Court ordered a change of venue in *Williams v. Superior Court.* That case involved two brothers who were charged with rape, kidnapping, robbery, and murder of a girl in Placer County. The trials were severed and the first brother was convicted of capital murder and sentenced to death. The prosecutor chose not to seek the death penalty against the second brother. His motion of a change of venue was denied by the trial court and he sought writ relief. The Supreme Court then reversed and ordered the change. (*Williams v. Superior Court, supra,* 34 Cal.3d 534.)

The Court found that the sensational nature of the rape, robbery and murder, and the seriousness of the offenses weighed heavily in favor of the motion. (*Williams v. Superior Court, supra,* 34 Cal.3d at p. 593.) The defendants were black and the victim was a young white girl. This raised racial and sexual overtones. And, even though the prosecutor had dropped the death penalty, the Court found that a sentence of life without parole was serious enough that the charges remained of the utmost severity. The Court said "It is well-settled that a charge of murder with special circumstances is the gravest offense carrying the gravest penalty—a factor weighing heavily in favor of the defendant." (*Ibid.* [citations omitted].)

Another case where the venue was changed involved the kidnapping of a young girl. (*People v. Davis* (2009) 46 Cal.4th 539.) The defendant in that case was charged with murder, burglary, kidnapping, and other crimes. It was alleged that he had kidnapped her from her own home. The nature of the offense was therefore highly significant. And the fact that the prosecution chose to seek the death penalty made the crimes among the most serious. The venue was therefore changed from Sonoma County to Santa Clara County. (*Ibid.*)

The present case is sensational like the *Williams* and *Davis* cases. While the racial element is different than *Williams*, the fact that the case involves a young girl who has never been found adds to the sensational nature of the case. It is more than simply a murder or

even special-circumstance murder case. The prosecution argues that the fact that there are no facts about what happened to Sierra makes the case less sensational. But the contrary is true. This case has captured the community's imagination, in part, because Sierra is a young girl who has never been found. People have been left to speculate what may have happened to her.

The nature of the allegations distinguishes this case from other special circumstance homicide cases. Like the *Davis* case, this case involves the disappearance of a young girl from a location close to her home. It also involves a community-wide search for the girl. The main difference is that, after years of searching, Sierra hasn't been found. This fact makes the case even worse, because it creates a mystery and leaves potential jurors to their imaginations to understand what happened.

The nature of the case weighs in favor of changing venue. And its gravity weighs heavily in favor of a change. (See *Williams v. Superior Court* (1983) 34 Cal.3d 584, 593.)

2. Nature and Extent of the News Coverage

The extent of publicity is quantitatively measured. For example, one might consider the number of newspaper articles or times the case was mentioned on the local news. The interest generated by this case has been extreme. The defense has supplied the Court with copies of the newspaper articles from the San Jose Mercury News it was able to compile. An unusually high number of articles appeared on the front page of the paper or the front of an interior section and the articles were unusually long. The depth of coverage by the Mercury News has been extreme and much more involved than the vast majority of other homicides in the County. Importantly, the Mercury News isn't the only news source serving the community. This case has received attention from the television outlets, the radio outlets, and online sources. The media has attended even the most routine court appearances.

The coverage has been so extensive that the survey showed that fully 81% of the respondents recognized the case. It also showed the prejudice that has set in: 53% of the respondents believed, before hearing any evidence except pretrial publicity, that Mr. Garcia-Torres was guilty. This number is significant, especially when one considers that the

Supreme Court has held that "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." (*Sheppard v. Maxwell* (1966) 384 U.S. 333, 351 (citing *Patterson v. State of Colorado ex rel Attorney General* (1907) 205 U.S. 454, 462 (Holmes, J.)

The prosecution cites cases where trial courts refused to change venue when surveys demonstrated similar percentages of people who recognized the case and who believed the defendant was guilty. But they ignore cases where venue was changed with similar or even lesser numbers. For example, the prosecution conducted a survey in *Williams v. Superior Court* and found that 22.4% of those questioned had formed an opinion about the defendant's guilt and only 64.7% felt they could set aside that opinion and decide the case only on evidence presented in court. (*Williams v. Superior Court, supra,* 34 Cal.3d at p. 590.) The numbers presented by the survey are within the range where motions to change venue have been granted (such decisions are not typically appealed so there are no appellate decisions in those cases) and, given the other factors involved, weigh in favor of changing the venue.

The nature of the publicity is essentially a qualitative issue. It looks at the type and tenor of the publicity and tries to measure its impact on potential jurors. Clearly inflammatory coverage may require a venue change, but more sober coverage may still infect the proceedings. "When a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt." (*Corona v. Superior Court, supra,* 24 Cal.App.3d at p. 877.)

The coverage of this case has been prejudicial. Reports described Ms. LaMar's parents as being "fraught with worry." (Exhibit 4 at p. 6.) The case was described as one that would "haunt parents." (Exhibit 4 at p. 77) The Sheriff even released a list of missing girls and suggested an unknown number may have been abducted, thus adding to the haunting nature of the facts. (See Exhibit 4 at p. 95.) It included information that would be inadmissible at trial, including the Sheriff's personal opinion about Mr. Garcia-Torres's guilt

(Exhibit 4 at p. 74) and a commentator's opinion about the evidence (Exhibit 4 at p. 90).

The coverage has created anxiety in the community about the safety of its children and has directed anger at Mr. Garcia-Torres as the person responsible for that anxiety. Most of the coverage has been guilt-oriented and created a presumption of guilt. That is why the survey showed such a high percentage of people who believe he is guilty after only being exposed to the media coverage. The prosecution argues that the coverage could have been worse in terms of dehumanizing the defendant, a fact that is undoubtedly true. But it also isn't dispositive.

Indeed, a venue change may be necessary even if the coverage was "voluminous but not inflammatory." (*Corona v. Superior Court, supra,* 24 Cal.App.3d at p. 877.) The coverage in the *Corona* case, as described by the Court of Appeal, seems to have been quite tame in comparison, yet a change of venue was granted. The Court said that the coverage generally "portrayed Corona as a quiet, respectable family man and as a religious, hardworking individual." (*Ibid.*) It went on to say that there was no evidence that he was the "object of hatred or vengefulness . . ." (*Ibid.*) Yet it held that the trial court should have granted the motion to change venue. It said that "Indispensable to any morally acceptable system of criminal justice is a verdict based upon evidence and argument received in open court, not from outside sources. When community attention is focused upon the suspect of a spectacular crime, the news media's dissemination of incriminatory circumstances sharply threatens the integrity of the coming trial." (*Id.* at pp. 877-888.)

The prosecution argues that, even if the coverage has been extensive, it has dissipated over time. The defense submitted news articles that continued up to a certain date and there have been fewer articles than when the case began. But the intensity of the coverage is increasing as we get closer to the trial. Several outlets requested permission to place a camera in the courtroom, the Mercury News reporter assigned to cover the trial asked to "live Tweet" the trial via Twitter, and the Court has had to create a sign-up sheet for media personnel. News articles and television and radio stories are generated after each court appearance. The prosecution argument is based on the exhibit the defense attached to its

initial moving papers but it ignores the reality of the coverage. It has continued beyond the filing of the motion and has begun to increase as we get closer to the trial. Interest in the case hasn't abated.

The defense plans to call Dr. Bronson to testify about the content analysis he performed on the media coverage of the case. A content analysis provides a mechanism to objectively evaluate the coverage and is a tool used by social scientists. Dr. Bronson will explain how he used it in this case and that the results show that the coverage was particular salient and impactful.

Both the nature and the extent of the news coverage of this case weigh in favor of a change of venue. The coverage has been pervasive and has created the belief in a large percentage of potential jurors that Mr. Garcia-Torres is guilty. It has contributed to an environment where it is reasonable likely that Mr. Garcia-Torres will be unable to have a fair trial in the present venue.

3. **The size of the community**

Santa Clara County is a large county. That fact is beyond dispute. But numbers alone are not dispositive. Cases have been moved from large counties in the past. For example, the Rodney King case was moved out of Los Angeles and the Johannes Mehserle (Oscar Grant) case was moved out of Alameda County. The real question is not the absolute size of the community; rather, it is whether the size of the community has neutralized the impact of the publicity. (*People v. Jennings* (1991) 53 Cal.3d 334, 363.)

Sierra's disappearance had a significant impact on Santa Clara County. Many people participated in organized searches and contributed money to help fund the effort. Websites have been created to follow the case and people have attended court dates wearing her favorite style of shoe. Searchers wore shirts labeled "Everyone's daughter." The community reaction to the case resembled the reaction one might anticipate from a smaller population center. This is one of those cases where the county's size hasn't served to neutralize the publicity's impact.

4. The status of the victim and defendant in the community

The prosecution claims that the status of the victim only refers to her pre-crime status in the community. The Supreme Court has ruled to the contrary. In *Odle v. Superior Court*, the Court criticized the trial court's failure to consider the fact that the victim in the case had become a "posthumous celebrity . . . ." (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 940.) It said the trial court should have considered the fact that newspaper articles revealed that the officer victim and his family were objects of sympathy and interest, that a fund had raised a significant sum for their support, and that the officer had been presented with awards after his death. (*Ibid.*)

Sierra has similarly become a celebrity following her disappearance. Articles have been written that have been sympathetic toward her and her family. The atmosphere that has been created is one where a juror's vote to convict would be seen by many as supporting Sierra and her family rather than a decision on the merits. This factor weighs in favor of changing venue.

Conclusion

An analysis of the relevant factors demonstrate that it is reasonably likely that Mr. Garcia-Torres will be unable to obtain a fair trial in Santa Clara County. The reasonably likely standard is less than a preponderance and any doubts should be resolved in favor of removal. Through the survey results and Dr. Bronson's testimony, the defense has demonstrated that the Court should change the venue for the trial. Therefore, this Court should grant the change of venue to ensure Mr. Garcia-Torres gets a fair trial.

Date: August 10, 2016

Respectfully submitted,

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I am a citizen of the United States and employed in Santa Clara County. I am over the age of eighteen years and not a party to this action. My business address is 701 Miller Street, San Jose, CA 95110.

On August 10, 2016 I served the within Reply to Opposition to Motion for Change of Venue on the District Attorney for Santa Clara by placing a copy in the interagency mail service and electronically to the business email addresses for Dep. DA's David Boyd and Dana Veazey.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 10th day of August 2016.

BJMatt